RETAIL DEALERS AGREEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 1256

A BILL TO REGULATE INTERSTATE COMMERCE BY PROTECTING THE RIGHTS OF CONSUMERS, DEALERS, AND END-USERS

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RETAIL DEALERS AGREEMENT ACT

MONDAY, JUNE 28, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Senator Howell Heflin (acting chairman) presiding.

OPENING STATEMENT OF SENATOR ROBERT DOLE

Senator DOLE [presiding]. If I can start, Senator Heflin will be along in a few minutes to preside over the hearings.

We are working on tax matters today, so I have asked if I might make a brief statement and introduce a witness from my home State who will be on the second panel. I would ask my statement be made part of the record.

I certainly want to commend Senator Heflin for convening this hearing today to take the testimony on the issue of predatory manufacturer practices in certain industries. The economic viability of small office machine dealers has for some time caused me great concern. These business people provide a service which is absolutely essential in today's sophisticated business world. The independent dealer gives the consumer a wide selection from which to choose and can carefully tailor his goods to the needs and desires of the individual buyer. This, in turn, insures healthy competition which is so vital to the marketplace.

Unfortunately, with increasing regularity, the tactics of some manufacturers have threatened the very existence of many small dealers. The tendency of many American manufacturers to utilize their own market groups to sell their wares has resulted in the dependence of many dealers on foreign products, largely made by corporate giants such as Sony, Canon, Minolta, Olivetti, and Toshiba. Most dealers have, at best, limited bargaining power against these big firms. This imbalance of bargaining power can result in a variety of unfair practices harmful to the small dealer. Conspicuous among these practices is the propensity of some manufacturers to cancel dealer contracts without cause.

Current laws have not always been effective in affording dealers a reasonable remedy to the inequitable treatment they sometimes receive. The bill before us today, S. 1256, seeks to alleviate the plight of business machine dealers through a variety of measures. While I applaud the drafters of this bill for taking a positive step toward remedying this situation, I have some reservations regarding specific parts of the bill that I believe may unnecessarily tamper with the inner workings of the marketplace. This bill can, however, serve as a useful vehicle to facilitate discussion on this important problem, and I look forward to the testimony that will be presented today.

The hearing this morning will focus on predatory manufacturer practices in the office copier industry. It should be noted that at the same time this hearing is being conducted, there are other possibly predatory activities that should be taken into consideration. I would like to introduce into the record several recent articles that suggest this possibility.

The first is an article dated April 1 from the Wall Street Journal and entitled " 'Gray Market' in Camera Imports Starts to Undercut Official Dealers." This article focuses on the problem of unauthorized marketing of foreign camera equipment by retailers which have obtained Japanese-manufactured cameras at substantial discounts from European sources. These discounts were possible because of foreign currency fluctuations against the dollar, particularly the French franc. Although gray market purchases and sales are not illegal, some manufacturers apparently are leaning heavily on their dealers to stop their gray market purchases, in order to protect their profits.

The next three articles I offer for the record are articles from the Washington Post, the New York Times, and the Wall Street Journal of June 23 and 24, pertaining to the indictments of 18 Japanese corporate officials who allegedly attempted to obtain proprietary computer data of the IBM Corporation by the payment of over $600,000 to undercover agents of the Federal Bureau of Investigation. It is not my intention to prejudge or make any observations on this pending criminal litigation, but I believe the practices underlying these charges speak for themselves.

We, on the Senate Committee on Finance, are acutely aware of the massive favorable balance of trade which the Japanese enjoy in their commerce with the United States. This surplus is currently estimated to be somewhere between $15 billion and $20 billion on an annualized basis.

S. 1256 is not a trade bill, of course, and it would apply equally to domestic and foreign manufacturers of office equipment. But the bill is directed at an unfair commercial practice that in some cases may increase foreign sales to the United States at the expense of competitive U.S. products.

Those who will particularly benefit from the measure are small businessmen, many with longstanding and close ties to the communities they serve. They are at an extreme disadvantage in dealing on equal terms with large foreign companies who seem to be obsessed with penetrating and capturing U.S. markets by whatever means. Not only markets for office copiers, but for countless other products. The Commerce Committee has previously held hearings on this issue and has concluded that legislation is justified to remedy the unfairness resulting from abuses of market power.

The witness list this morning includes representatives of organizations and manufactures who have reservations about S. 1256 and I will closely examine their comments. I do not want to pass judgment on an issue until the hearing record is complete. However, this hearing today should serve to not only focus attention on certain unfair practices, but it also will serve as fair warning to those who would manipulate our markets and our long-established principles of fair trade. At some point, the abuse must stop. We may well be rapidly approaching that point.

I am pleased to have the opportunity to express my preliminary views. I would ask that the statement of Senator Larry Pressler be made part of the record, too.

[The submissions of Senator Dole and the prepared statement of Senator Pressler follow:]

[From the Wall Street Journal, Apr. 1, 1982]

"GRAY MARKET" IN CAMERA IMPORTS STARTS TO UNDERCUT OFFICIAL DEALERS

(By Ann Hughey)

NEW YORK—American dealers and distributors for foreign camera makers are getting tough price competition from cheap imports—of their own equipment.

The imports supply a generally legal "gray market" that's thriving through some fancy arbitrage. When, for example, a strong dollar cheapens the French franc relative to the Japanese yen, importers sometimes can acquire and bring to the U.S. Japanese cameras from France at a much lower dollar cost than from Japan. That permits lower retail prices.

To take just one example, the Olympus OM-10 camera (recently discontinued), which had a dealer cost of $224.95 and typically sold at retail at $239.95 could be found on the gray market for $189.95.

Gray-market retailers are usually camera shops and mail-order houses. Their price undercutting has cost some official American distributors of foreign cameras as much as 30 percent of their sales recently, the distributors complain. The competition is particularly acute in New York, a center for discount and mail-order camera gear. One camera distributor says his salesmen's income has shrunk by 75 percent in the past year.

Of the roughly $50 million a year in top-quality foreign camera equipment sold in the U.S., perhaps 15 percent is sold on the gray-market, according to James Chung, a photographic industry securities analyst.

SOME DECEPTIVE BARGAINS

Vivitar Corp. says its new 70-to-210-millimeter zoom lens appeared in Europe three months before it did in the U.S. Importers snapped up the lens, and it went on gray-market retail sale at $189 when American dealers were themselves paying Vivitar $229.97 for the lens. The lens has a list price of $429.95, though even Vivitar's dealers charge much less.

Some distributors say that not all the bargains are what thy appear, however. An employee of one foreign camera maker says his company sells "cheapo electronic flashes" branded with its own name in Hong Kong, but the company wouldn't "put its name on them in this country." But the Hong Kong flashes are turning up on the gray market, he says, and "it embarrasses us."

The camera makers, and their distributors, are employing all sorts of tactics to fight the gray-market competition. The most obvious tactic, of course, is competitive price-cutting, but that is also the most painful. Some manufacturers are giving longer-lasting warranties on their U.S. products than on Europeans goods. Minolta Corp. took out advertisements to warn that its international gray-market camera warranties are invalid in the U.S.

Customers who unhappily discover that will "blame whoever sold them the camera," Minolta warned retailers in an ad. "And in all likehood go elsewhere when it comes to buying lenses . . . and other accessories. So it could result in the loss of some real long-term profit."

Hasselblad is giving away expensive camera gear as bonuses to dealers. Before that, Olden Camera, on 32nd Street in the heart of the New York camera market, was buying one Hasselblad model from its official distributor at $1,543.95 and marking it up to only $1,575 at retail while gray marketers were selling the camera for only $1,350. Now Olden's price is $1,365.

Karl Thompson, sales manager at Olden Camera, says his store itself has resorted to the gray market "a little bit, but not much, because, let's face it, at any moment the U.S. distributor can drop the price and the dealer can be left sitting on merchandise he paid more for."

For example, he says, the store bought Canon A-1 cameras with 50-millimeter lenses and cases for $370 on the gray market at a time when Canon's distributor was offering the package at $396. But then the dealer price was cut to $362, "cheaper than what we paid for them on the gray market," Mr. Thompson observes.

Nikon Inc. also has cut prices, on lenses by 30 percent, in part to compete with the gray market. Bell & Howell-Mamiya Co. is suing two importers in New York on grounds of unfair competition and trademark infringement. Vivitar recently threatened publicly to cancel its contracts with distributors it catches dealing in the gray market.

Most measures have been ineffective, says Robert Brockway, chairman of the Olympus Camera Corp. subsidiary of Olympus Optical Co. of Japan. "I just don't think lawsuits and convoluted warranties are the way to combat the gray market," he says.

The way, then? Olympus has introduced a new camera made only for the U.S. market. It's decorated with a little American flag shield. Olympus dealers who buy 300 of the cameras or meet other goals get seven-day Caribbean cruises for two. Sales clerks get lesser goodies—two pairs of socks or a leather keyholder for one sale, for example, and a camel-hair sports coat for selling 31 cameras.

OTHER GRAY MARKETS

Gray markets have prospered in the past, disappearing when foreign-exchange rates become unfavorable. The markets exist in goods other than cameras. Although he won't disclose any details, Chanel Inc. Senior Vice President Charles Phillips concedes that the company has had troubles with gray-market Chanel perfume. Seiko Time Corp. is suing a New York department store on the ground that its ads for gray-market Seiko watches mislead by ignoring the differences in the models and their warranties from those watches distributed by Seiko itself.

Gray-market competition in cameras may have become so widespread partly because of oversupply. Even without foreign-exchange bargains, prices were headed downward. Sales of expensive 35-millimeter cameras and lenses boomed in the 1970's but have leveled off, especially sales of single-lens-reflex cameras. "Everybody who wants one has one," says a camera-company employee.

Japanese makers have done little by way of cutting supply. They need to maintain their cash flow and "they never lay of people," says Mr. Chung the securities analyst. "They have to produce to keep the work force. They have to get rid of the production." Mr. Chung thinks distributors and retailers are suffering most, and the makers "don't care as long as they sell the cameras."

K. Chiwata, president of Pentax Corp. in the U.S., says that "competition is just throat-cutting." So it is also, he says, in Japanese television and automobiles. At times even dealer camera prices have been lower in Europe than in the U.S., enhancing the bargains that exchange rates create. But Mr. Chiwata says Pentax has managed to keep its European prices high enough to avoid the worst of gray-market price-cutting.

"It's really up to the manufacturers," says Ed Buchbinder, vice president of Alkit Camera Shops Inc. in New York. "If they wanted to, they could solve the problem tomorrow simply by making the price here the same as it is in Europe." His store doesn't buy on the gray market, he says, because "I don't think it's ethical." He says the consumer gets an inferior warranty or no warranty. But his policy may change. "It's a matter of survival," he says. "You can only be as ethical as your business allows you to be."

[From the Washington Post, June 23, 1982]

PLOT TO STEAL IBM DATA IS CHARGED TO JAPANESE

(By Mark Potts and Mary Thornton)

The FBI, in what is believed to be the biggest industrial espionage case ever, yesterday charged 18 men, including several high-ranking executives of Hitachi Ltd., the Japanese electronics giant, with paying an undercover agent $648,000 to steal technical data on new International Business Machines Corp. computers.

The FBI announced that it had arrested six men in California and obtained warrants for 12 others, most of them Hitachi executives based in Japan.

We've named 12 people [in the indictment] that are pretty top management in that corporation," said John Gibbons, chief of the criminal division in the U.S. attorney's office in San Francisco. "They're very high-level people in the company." Hitachi, one of Japan's largest makers of computers, has been aggressively expanding into the American data-processing market in the past few years and has recently emerged the leader in some areas of computer technology, according to computer industry analysts.

The other men named in the complaint are officials of other Japanese electronics companies competing in the U.S. computer market. The FBI and an IBM spokesman said that none of the computer giant's employees were believed to be involved. IBM cooperated with the investigation, providing, "excellent assistance," FBI Director William H. Webster said.

Officials of Hitachi and the other companies allegedly involved in espionage could not immediately be reached for comment.

Gibbons said the investigation which began in November, was continuing.

The arrests yesterday came after the six men, three of them Hitachi employees, paid the undercover agent $500,000 for technical data on IBM computers. The transaction followed an earlier payment of $122,000, for which he actually turned over some documents provided to the FBI by IBM.

The indictment also includes another case in which the agent was paid $26,000 by employees of Mitsubishi Electric Corp. for other IBM information. The FBI said the Mitsubishi employees became involved in the case in January, and apparently were not aware that Hitachi was allegedly seeking similar information.

The FBI said it first became aware of the alleged espionage last November, when a confidential source told it the Japanese companies were interested in obtaining the IBM technology. FBI spokesman Tom Anderson said the source then acted as a middleman, introducing the Japanese businessmen to an undercover agent who offered to provide the information for a price. Other undercover agents apparently were also used in the case.

IBM, in a brief statement yesterday, said it became aware of the espionage attempt at about the same time and contacted the FBI. "There was some information that came to our attention almost simultaneously when we were approached," Gibbons said.

According to the indictment, the information desired by the Japanese included design information on IBM's 3081 computer, a recently introduced model that is the company's largest; data on IBM's 3380 memory-disc-storage unit; microcode used to program computers; and "architecture" on IBM circuit boards, which Gibbons likened to blueprints for computer design.

Gibbons said the Japanese apparently hoped to drastically reduce the time needed to catch up with the new IBM designs. "Instead of wasting time doing reverse engineering, they will in turn be ready to proceed and manufacture and compete extremely expeditiously," Gibbons said.

It's safe to say the value of the technology and equipment involved they were seeking goes into the millions and millions of dollars," Anderson said. It's definitely one of the largest cases of its kind ever handled by the FBI." Gibbons said he did not know of any larger industrial espionage case handled on the federal level.

"This was a classic example of the value of an undercover operation designed to ferret out the theft of high technology," Webster said.

Gibbons said the indictments covered officials of all three of Hitachi's main computer works, or divisions. Among those indicted were the general manager of Hitachi's Kanagawa works in Japan, the deputy general manager of the company's Odawara works, and other executives of the company bearing titles such as department manager and senior engineer.

"I can't say they were representing the companies, but we were dealing with people that were employees of these companies," Anderson said.

The men arrested in California yesterday were Kenji Hayashi, senior engineer, from Hitachi's Kanagawa works; Isao Ohnishi, section manager, from Hitachi's software works in Japan; Kunimasa Inoue, a programmer for Hitachi America Ltd. in San Francisco; Keizo Shirai, section manager for Nissei Electronics Ltd. in Japan; Takaya Ishida, of Mitsubishi Electronics America Inc. of Compton, Calif., and Tom Yoshida, president of NCL Data Inc., of Santa Clara, Calif.

The six men were changed with conspiracy to transport stolen property, a felony with a maximum penalty of five years in prison and a $10,000 fine.

The 12 men still sought, nine of whom work for Hitachi, all reside in Japan.

[From the New York Times, June 24, 1982]

JAPAN'S HITACHI ADMITS PAYMENT FOR IBM DATA

(By Steve Lohr)

TOKYO, June 23.—Hitachi Ltd., a leading Japanese computer manufacturer, said today that it had authorized the payment of $540,000 for confidential computer information taken from the International Business Machines Corporation.

Hitachi said it was still studying the legality of the payment, which was made to a consulting firm that apparently was a decoy used by the Federal Bureau of Investigation. Buying information from research firms is common within the computer industry, and the key questions seemed to be whether Hitatchi knew it was paying for stolen information and whether it was coerced by Federal agents.

"It seems that Hitachi stepped into the trap," said Yasushi Sayama, a spokesman for Hitachi in Tokyo.

The startling admission came in an evening news conference, following a day in which expressions of disbelief and outrage ran high in Japan, and it is likely to touch off a major scandal here.

[In San Francisco, a Justice Department official denied that its charges that employees of two Japanese computer companies had tried to steal trade secrets from I.B.M. were intended to exert pressure on Japan in trade negotiations. Page D5.]

Hitachi's admission came after the United States Justice Department on Tuesday charged 17 Japanese businessmen, mostly from Hitachi and the Mitsubishi Electric Corporation, and one American with conspiring to steal confidential information from I.B.M. For its part, Mitsubishi Electric issued a statement today saying that the company is convinced that "there is no basis, in fact or in law, for these serious accusations" against Mitsubishi personnel.

Hitachi's version of its involvement in the case differs somewhat from that presented by the Justice Department in Washington. Justice Department officials, for example, said that Hitachi had paid $622,000 to an undercover agent of the Federal Bureau of Investigation. But Hitachi said it had authorized payment of $540,000 to what it believed to be a consulting firm, Glenmar Associates, which it now suspects was the F.B.I. decoy firm.

Apparently, Hitachi's defense for its 10 employees charged in the case will be that they may have been unfairly "entrapped" by the F.B.I. operation. In the United States, defendants cannot be convicted if they are judged to have been coerced into illicit acts by undercover law enforcement officials.

Hitachi officials said that the company was investigating whether the payments its employees had made were illegal. In Japan, undercover agents can only be used in narcotics cases.

"It is the company's policy to carry its business activities out justly and fairly and not to resort to illegal ways," said Yasukichi Hatano, manager of Hitachi's computer division.

HITACHI'S ACCOUNT

According to Hitachi, two men from the Glenmar firm, Alex J. Harrison and Dick Kerigan, approached Kenji Hayashi, a Hitachi senior engineer who made frequent trips to the United States, "sometime before April 23."

On April 23, the company said the Glenmar men spoke with Kisaburo Nakazawa, general manager of Hitachi's Kanagawa works, who was visiting America. They presented Mr. Nakazawa with their proposal to sell the I.B.M. information and proposed a price, Hitachi said. Mr. Nakazawa said the price was too high, according to the company's account.

Mr. Nakazawa returned to Japan. But Mr. Hayashi continued to negotiate with Glenmar, Hitachi said, and, sometime later, they agreed on a price of $540,000. On May 19, Hitachi said, it paid $30,000.

Then on June 19, Nissei Electronics Ltd., a Japanese trading firm hired by Hitachi, paid Glenmar, at Hitachi's direction, an additional $510,000, the company said. Hitachi has not yet compensated Nissei Electronics for the payment it made on Hitachi's behalf, company officials said.

Hitachi said that it lacked any further details because the key man involved, Mr. Hayashi, is under arrest in California. But the company officials portray Glanmar as aggressively having pressed what it had for sale on Hitachi.

NO MATERIAL RECEIVED

Hitachi has not received any materials for the $510,000 payment it authorized, according to Mr. Sayama, the company spokesman. It is still checking to see if it received anything for the earlier $30,000 payment.

Representatives of Mitsubishi Electric have been separately charged with paying $26,000 to the F.B.I. undercover agent.

Buying information from research firms is a common practice within the computer industry worldwide. Japanese computer companies are known for employing such consulting firms in the United States. "Many of these consultants are I.B.M. watchers, and Japanese computer makers are their very good clients," said Teijiro Kubo, editor of Computopia, a leading computer trade publication in Japan. "The exclusive information is sold at very expensive prices."

Moreover, industry executives and consultants here note that there is an area of uncertainty regarding the purchase of valuable information on competing companies. To be truly valuable, such material must be something that cannot be obtained through the normal channels of questioning and study and is not available to security analysts or financial journalists.

Consultants say that companies in the computer and semiconductor fields will pay up to $50,000 for extraordinary industrial intelligence.

"It is not so surprising that something like this occurred," said Hiroshi Ebihara, a principal of Mckinsey & Company, a consulting firm, in Tokyo. "But I am astounded at the amount of money and that Hitachi was involved."

Given the amount of the authorized payments, senior executives at Hitachi must have known about them and that they were not ordinary business expenses, analysts agree.

[From the Wall Street Journal, June 24, 1982]

JAPANESE RILED BY U.S. CHARGES OF IBM THEFT

MITSUBISHI ISSUES DENIAL; HITACHI SAYS IT DIDN'T KNOW DATA WAS STOLEN

(By Masayoshi Kanabayashi and Urban C. Lehner)

TOKYO—The Japanese establishment was in an uproar over U.S. criminal charges that officials of two Japanese companies conspired to steal secrets from International Business Machines Corp.

One of the companies, Mitsubishi Electric Corp., vehemently denied the charges, saying U.S. authorities had made "a terrible mistake." The other, Hitachi Ltd., said it had bought some information on IBM from a U.S. consulting firm recently but didn't know whether it was stolen.

The charges were especially stunning because they involed two companies that are among Japan's largest, most respected and most technologically advanced. In the wake of the charges, some Japanese worried about the future of U.S.-Japan relations generally and U.S.-Japan technological cooperation particularly.

Some complained about the FBI's reported method of handling the investigation, and a Japanese news service quoted Japanese police officials as saying they aren't obligated to extradite 12 charged officials still in Japan "if the FBI actually used an undercover operation as has been reported."

There was also grumbling that the charges were a politically motivated effort to "get" Japan. "Even among some Americans," said Asahi Shimbun, a major daily newspaper, in a front-page dispatch from Washington, "there can be heard voices that this was a highly political action against Japan."

Japanese government officials, including Kiichi Miyazawa, chief cabinet secretary, cautioned against interpreting the step that way. A Ministry of International Trade and Industry official in charge of data processing, Katsusada Hirose, said only that the incident was "regrettable, especially at this time when we are trying to promote cooperative relations of the two countries in various fields of technology."

FBI officials arrested six people in California Tuesday and obtained warrants for 12 others, said to be in Japan, on charges of conspiring to transport stolen property from the U.S. to Japan, Another person was arrested later Tuesday, and an employee of National Semiconductor Corp. was arrested yesterday afternoon. The FBI alleged that officials of Mitsubishi Electric and Hitachi paid $648,000 to an undercover agent to obtain the stolen secrets.

Twelve of the suspects were from Hitachi, who were accused of paying $622,000 for secrets.

In two news conferences on the charges Wednesday, Hitachi at first defended the integrity of its officials generally be conceded that until it had investigated further it couldn't rule out the possibility that some may have gone "further than is proper" to obtain information.

In a second news conference Wednesday evening, Hitachi said that, based on the incomplete information available to it, Hitachi officials had made two payments totaling $546,000 to a U.S. consulting firm they identified as Glenmer Associates, one of $31,500 on May 19 and one of $514,500 on June 18, Hitachi said it didn't know where the consulting firm is based or exactly what kind of information was obtained, but said that Kisaburou Nakazawa, head of its computer manufacturing plant in Kanagawa, Japan, "had judged the information to be worth the payment."

Hitachi said the information had been purchased by a subsidiary. Nissei Electronics Corp., but that Hitachi doesn't know if it has been received. It said it didn't know if the payments it made were the ones the charges were based on, but that based on its investigation so far they seemed to fit. The company said it didn't know more about the charges because a key official, Kenji Hayashi, is among those arrested in the U.S.

Hideo Ohta, a Mitsubishi Electric managing director, said Mitsubishi and its U.S. subsidiary had paid "no money" for the purpose alleged. Mitsubishi Electric officials are charged with paying $26,000 for the secrets.

Four Mitsubishi Electric officials were charged, and one of them, Takaya Ishida, was arrested. The company said Mr. Ishida has been assigned to the U.S. since March 1980 to study the U.S. market and consult with the company's customers. Mitsubishi Electric said the other three visited the U.S. separately for about one week each between January and March of this year in connection with a business transaction with a U.S. * * *

PREPARED STATEMENT OF SENATOR LARRY PRESSLER

I want to thank my colleagues for permitting me to submit testimony in support of S. 1256, the Retail Dealers Agreement Act.

I should immediately point out that I offer this testimony from a unique perspective in that I have had the benefit of chairing a hearing on this very piece of legislation. The Subcommittee on Business, Trade and Tourism, which I chair, conducted a hearing on S. 1256 on October 29, 1981.

It became clear to me during that hearing that the people who are seeking this legislation, retail dealers of office equipment, have a number of very real, very serious problems which can only be solved through Congressional action. These dealers have tried in every possible way to achieve a reasonable compromise with the manufacturers whose products they sell. Unfortunately, the dealers were met with resistance at every turn.

This is important to remember since, frequently, groups seek legislation before they have explored alternative solutions. I think we would all agree that legislative remedies should be a last resort. In my opinion, the dealers, most of whom are small businessmen, have exhausted all other options and are only coming to Congress because legislative action is their only choice.

This brings us to an examination of the problem. The testimony you will hear today is a specific explanation of situations where dealers have been treated unfairly and unethically. The situations described during the Business, Trade and Tourism Subcommittee hearings included:

1. Manufacturers terminating dealers' contracts without notice or proper cause;
2. Manufacturers establishing new dealerships near existing dealers when the geographic area involved cannot possibly support two dealerships simultaneously;
3. Manufacturers refusing to provide dealers with sufficient supplies, parts, manuals and other materials necessary to the operation of a successful dealership;
4. Manufacturers retaliating against dealers who voiced complaints or opposition to the unfair business practices frequently pursued by many manufacturers;
5. Manufacturers refusing to offer fair compensation to long-term dealers whose contracts are expiring;
6. Manufacturers refusing to renew a dealer's contract without proof of poor performance.

It is also important to point out that after individual office equipment dealers testified last fall before my subcommittee, several were subjected to harassment by the manufacturers. One small businessman, Merlin Jeitz of Watertown, South Dakota, testified last fall. As his testimony this morning will explain, in the last several months he has experienced serious difficulties with Sharpe Electronics. Seemingly coercive attempts like this are of great concern to me. Congress has a responsibility and an obligation to hear the concerns of American citizens. No American should be intimidated or harassed for speaking the truth.

These dealers are small businessmen struggling to make a living during a time of severe economic difficulty. They should not be subjected to unfair business practices as an additional burden. S. 1256 is a reasonable alternative solution. The manufacturers have shown their unwillingness to voluntarily restructure dealer contracts in a fashion which would ensure future good faith dealings by both parties. In the final analysis, if the dealers are to have any chance to establish equitable relationships with these manufacturers, we must provide them with the remedies outlined in S. 1256.

Senator DOLE. Senator Heflin, could I introduce a Kansas witness who will be on the second panel?

Mr. Chairman, Mr. Kenneth Stephenson is a small businessman residing in Salina, Kans. He is president of Central Office Products, a small office machine dealership marketing typewriters, calculators, and copiers to customers in and around the Salina area. Mr. Stephenson has been a dealer for almost 30 years, having established his business in 1953. He bought his company from a friend and fellow dealer, Harley Rhods, of nearby Hays, Kans., after working for him in Salina for almost a year.

Mr. Stephenson is very active in the local community. He is past president of the Salina Chamber of Commerce. He is also a founding director of the bicentennial building authority. He currently serves as chairman of the board of the First United Methodist Church and trustee of Asbury Hospital. Mr. Stephenson is a director of Salina, Inc., the community's local industrial development commission.

He is a graduate of the University of Kansas, class of 1952.

I am pleased to introduce Mr. Stephenson to the committee and look forward to hearing his remarks.

Mr. Chairman, I have to work on increasing taxes, which I am sure will please everyone. I have to hide out. Thank you. [Laughter.]

Senator HEFLIN. Thank you, Senator Dole. We are delighted to have the former Governor of Nebraska with us. We are delighted to hear from you, Senator Exon.

STATEMENT OF HON. J. JAMES EXON, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator EXON. Let me begin by expressing my appreciation to you and the Judiciary Committee for allowing me to be here this morning. I am not a member of the Judiciary Committee, but I am a member of the Commerce Committee, and the principal introducer of S. 1256.

As a principal sponsor of S. 1256, I have direct interest in the future of this bill, which I believe is very sound, and I believe is very necessary.

Mr. Chairman, as you know, the Senate Science and Transportation Committee has also been directly involved with this measure. Hearings were held in October last year, and the committee reported the bill by a unanimous vote. We are pleased that the Judiciary Committee is now hearing this measure, in order that the Commerce and Judiciary Committees may jointly report this legislation to the floor.

Over the last decade, Japanese and European manufacturers have captured a huge share of the small office equipment market. For example, in 1979, the imports of business machines and parts totaled more than $1 billion. Foreign firms, as they began their penetration of the U.S. market at the time relied upon the independent office machine dealer as a low-cost, already existing marketing arm in the United States to establish servicing capabilities.

The strong position of these home firms was established by a product innovation, competitive pricing and aggressive marketing in, on behalf of, and by U.S. dealers. This dependence on foreign suppliers for products has given the manufacturers inordinate bargaining power. Gradually, abusive practices by foreign manufacturers have made it more and more difficult for small office machines, dealer businessmen to remain in business.

The Commerce Committee hearing heard testimony from dealers who estimated losses at $30 million annually with bankruptcies and severe financial loss, a not uncommon occurrence. The problems run the gamut from inadequate supply of parts for servicing to arbitrary contract terminations.

Mr. Chairman, dealers on an individual and collective basis through the National Office Machine Dealers Association have attempted a number of remedies to their problems. Dealers have sought to negotiate directly with the corporate executives of both foreign and domestic firms without success.

In the foreign area, they work through the State Department officials with no success. They have also asked the U.S. Trade Representative for assistance. However, the Trade Representative could not help because the firms operated through their U.S. subsidiaries, and U.S. trade agreements do not apply.

Requests for action by the Federal Trade Commission were also unsuccessful. The FTC said it was not within their jurisdiction.

Existing legal remedies afford little hope to a financially troubled dealer. The Uniform Commercial Code has not been helpful to dealers, nor has State contract law—often the contracts are not written and the statute of frauds applies to an action brought by the dealer. Dealers have rarely been successful in the courts. In any event, dealers simply can't afford costs of drawn-out legal actions.

Mr. Chairman, this bill is patterned after the Automobile Dealers "Day in Court" Act and it is intended to aid the small equipment dealer in negotiating with large and very powerful suppliers.

The bill provides a dealer with a legal cause of action when the supplier does not act in "good faith" in his dealings with the dealer. Good faith is defined as freedom from coercion, intimidation, threats, fraud, and unconscionable conduct. This duty to act begins at the inception of the relationship and runs through its termination. The bill also provides for notice to an existing dealer if the manufacturer decides to establish a new dealership in the existing dealer's market area as defined in the dealer agreement. The existing dealer may then go to court for a decision on whether such an establishment was an arbitrary act taken by the manufacturer. This section of the bill is patterned after the Massachusetts statute regulating business practices between motor vehicle manufacturers and dealers.

During the Commerce Committee's hearings on S. 1256, we heard testimony that the definition section was too broad, going beyond the intent of the bill. As I indicated when I introduced this legislation, its purpose is to cover only office equipment dealers. I therefore offered a package of amendments which were adopted narrowing the definition to ensure that this bill only covered office equipment dealers.

S. 1256 would afford these small office machine dealers their day in court, to deal with abuses arising out of their relationship with manufacturers. It would impose on those manufacturers and dealers alike the duty to act in good faith in their business relationships with each other.

Mr. Chairman, there is one final point which I believe needs to be clarified for the record. It has been brought to my attention that certain interested parties have expressed concern that this legislation has been "railroaded" through the Senate. Let me outline briefly the chronology of events of S. 1256.

I introduced this bill in May of 1981, and it was jointly referred to the Commerce and Judiciary Committees. Hearings were initially scheduled in the Commerce Committee for mid-September, but delayed until late October, giving ample time for all interested parties to notify the committee of any interest they may have had in this bill.

Markup of this legislation in the Commerce Committee did not occur until mid-December 1981 some 6 weeks after the hearings.

It is now June 28, 1982, over 13 months since the bill was introduced. I would only say, Mr. Chairman, that those who may think this bill has been on the fast track, and that ample opportunity has not been afforded all parties to comment on the legislation and make suggestions, will only find their arguments falling on deaf ears as far as this Senator and others are concerned.

Once again, Mr. Chairman, I very much appreciate the courtesy shown me by you and the members of the Judiciary Committee. I look forward to the testimony.

Thank you.

Senator HEFLIN. We have a number of witnesses today, and we are going to try to move as rapidly as we can. Most of the witnesses have written prepared testimony, which will become a part of the record. So, therefore, in the oral testimony, there is no need to read it or to read at length from the written texts that you have, but to give us in succinct, clear language the main points that you have.

We also have a device of red lights, green lights and a caution light which will go on at various times, and with some witnesses we are going to allot 10 minutes to, and some 5 minutes to. We would appreciate it if you could organize and make your oral statements as succinctly and comprehensively, but as briefly as possible.

Senator DOLE. If all else fails, there is a trapdoor under the table. [Laughter.]

Senator HEFLIN. Well, there may be a guillotine that comes down. [Laughter.]

So if we will, our first witness is the Honorable William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice.

Mr. Baxter, we are delighted to have you with us. Will you give us your views pertaining to this legislation?

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. **Baxter**. Thank you very much, Senator. I am delighted to be here this morning. I apologize for the state of my voice, which is very, very weak, and if I stay cuddled up next to this microphone I trust I can make myself heard.

Speaking for the Department of Justice and the administration, we strongly oppose this legislation. We think it is very misguided.

I would refer to two portions of the legislation. One portion creates essentially new contractual remedies, provides access to a Federal forum without regard to the amount in controversy, and puts good faith standards into existing contractual relationships.

As a matter of fact, all of the obligations are enforceable in the State courts, the statute of frauds applies in the State courts, and our States import good faith standards into contractual dealings. There is nothing here, so far as we can see, except the unjustifiable intrusion of a new Federal regulatory regime into a situation that is presently more appropriately handled at the local levels.

The second portion of the bill, and much more troublesome, however, is an intensely anticompetitive provision that enables existing dealers to block the creation of new dealerships, simply by filing in the Federal courts, once again.

In the absence of a provision in the dealership agreement, which may be oral—it doesn't have to be in writing—in the absence of such a provision, an area of over 30,000 square miles is carved out for each existing dealer as an anticompetitive enclave from which he can resist the introduction of new and competitive outlets.

We see no justification for this legislation whatsoever, and will oppose it vigorously.

The notion that small dealers are in some sense at the mercy of large manufacturers is a notion we have heard before. It has a certain intuitive appeal. However, like many notions with intuitive appeal, it turns out not to have a great deal of substance. It is perfectly true, of course, that manufacturers are many, many times as large as these distributors, but that really is not the point.

The manufacturers are dependent upon these distributors for distribution in precisely the same sense that the dealers are dependent upon the manufacturers. Each manufacturer has to contend with hundreds of these dealers, and it is not inexpensive for a manufacturer to terminate one dealer and commence relationships with another.

It costs many thousands of dollars, and this is true whether you are talking about terminating one operator of a gasoline station and putting in another, or terminating one manufacturer of a fast food outlet and putting in another. There are research costs, recruiting costs, there are training costs, and they are not insubstantial. So the notion that manufacturers can or do go around willy-nilly terminating dealers simply is not borne out by any facts that I have ever seen.

The two parties have a common objective to which they are working. They would like to sell as much of the manufacturer's equipment at the best prices they can possibly obtain for it in the local community. They are, of course, at odds over how the gross revenues received from those sales are to be divided between them; the manufacturer would like the dealer margins to be as low as possible and the dealer would like his margins to be as wide as possible, and that is, of course, precisely what they bargain about.

In some industries, we deprive the parties of the right to bargain freely about that division of the revenues, calling it a regulated industry. The bill does not purport to do that. Nominally, it leaves that subject to bargaining, but introduces a variety of procedural complications and, in particular this anticompetitive veto against the creation of new dealerships which we find very troublesome from a competitive standpoint.

Mindful of your admonition to be brief, Senator Heflin, I will stop there, but would be happy to answer questions should the committee have any.

Thank you, sir.

Senator **Heflin**. Senator Dole, any questions?

Senator **Dole**. No questions, except I think we share some of the concerns you express. I am not sure we can accommodate every concern. I have not read the full statement, but I did indicate in my statement that we did have concerns about portions of the bill. Maybe we can work out some of your concerns.

Senator **Heflin**. Senator Exon, do you have any questions?

Senator **Exon**. Yes, Mr. Chairman, I do.

Mr. Baxter, if the Justice Department had the opposition to this bill that you just stated, why did we not hear of that before the Commerce Committee?

Mr. **Baxter**. We were not invited so far as I am aware to testify before the Commerce Committee.

Senator **Exon**. You don't need an invitation to appear before a committee if you have a strong opinion about a bill. You must know that as a member of the executive.

Mr. **Baxter**. I assume that if I called Senator Packwood and asked to go up and appear that would be afforded. This bill did not come to my personal attention until it moved to the Judiciary Committee.

Senator **Exon**. Who brought this bill to your attention?

Mr. **Baxter**. A member of my staff at the Justice Department.

Senator **Exon**. How did it come to his attention?

Mr. **Baxter**. I do not know the answer to that.

Senator **Exon**. Mr. Baxter, I was quite surprised in reading your testimony and then listening to you say it, and it probably indicated to me more than anything else that it might be that the Justice Department simply does not understand this legislation.

I quote from your statement: "S. 1256 would create a complex Federal regulatory scheme covering the distribution of products used in business offices."

What wording in S. 1256 could you point to that indicates that we want to create a Federal regulatory scheme? I would assure you that it was the thrust of those who suggested that this legislation was necessary that we not create any more Federal regulatory schemes.

Mr. **Baxter**. Well, I would point first of all, among various possibilities, to the language that appears at lines 17 and following on page 5, *having to do with* the circumstances under which a manufacturer might be permitted to create a new dealership.

The court is instructed to consider a panoply of considerations, a situation that is quite mindful of the entry conditions laid down by the ICC or the CAB under their respective statutes before we wisely altered their jurisdictions.

The courts, for example, shall take into account whether the establishment of a new dealership is warranted by economic or marketing conditions, inquiries into which one would not suppose the typical Federal district judge was particularly well suited. He shall take into account current and past volume of retail sales. He shall consider the effect of the investment made by the dealer with the diminished—I am not sure what that means. I think it means to say the extent to which the investment made by the objecting dealer would be diminished.

Again, there is a very difficult and highly subjective line of inquiry. The district judge must consider the permanency of the investment of the objecting dealer. I am not sure what that means, either.

Finally, he is to determine whether objecting dealers are providing adequate competition, and it is furthermore provided that the interests of the manufacturers for further market penetration, that is, selling more goods, necessarily at lower costs to consumers, is not itself a justification for allowing new establishments.

There is, in short, a very clear instruction to the district courts to behave as a protective administrative agency to shelter the rewards and rates of return of this particular segment of the economy. That sounds to me very much like the regulation which we are now abandoning. It has not necessarily a desirable distinction, but it is to occur in the Federal district court.

Senator Exon. Let me ask you another question, trying to clarify this. Do you consider the Federal courts a complex Federal regulatory agency?

Mr. **Baxter**. It depends on the instructions given. Given these instructions, I do so consider them.

Senator **Exon**. You are aware, are you not, that this bill is, in such a form I explained, a dealer "Day in Court" bill, just allowing them entry into the Federal court. I think you are going far beyond it. The last thing this Senator wants to do is create another regulatory agency, and I can't speak for the office machine dealers individually or their association, but I suspect that these independent businessmen would be the last that would suggest that we create any new Federal regulatory scheme or agency. All this is is entry into the Federal courts, and I think that you are going far beyond what is the intent and the effect of this legislation with your explanation.

One other question I might ask, then, as a followup question: Does the Justice Department as now structured, and does this administration, since you indicated you were speaking for the administration, does the Justice Department and does the administration oppose the so-called Automobile Dealers "Day in Court" Act which was passed many years ago, and if you do oppose that, have you called or suggested repeal of that legislation?

Mr. **Baxter**. The question of the Automobile Dealers "Day in Court" Act has not come before the administration, and I don't believe there is any position. There is nothing, however, in the Automobile Dealers "Day in Court" Act that sets forth provisions comparable to the entry-blocking provisions of this legislation.

Senator **Exon**. You think that the Automobile Dealers "Day in Court" Act has had any serious adverse effects between the automobile manufacturers and their dealers?

Mr. **Baxter**. Yes, I do, but I have not seen any study that would quantify the extent to which that is true. I think it has generated a great deal of unnecessary litigation.

Senator **Exon**. How long have you been in the Department of Justice, Mr. Baxter?

Mr. **Baxter**. About a year and a half.

Senator **Exon**. You are part of the new administration?

Mr. **Baxter**. Yes.

Senator **Exon**. Thank you.

Senator **Heflin**. Thank you, Mr. Baxter. We thank you for your testimony.

[The prepared statement of Mr. Baxter follows:]

PREPARED STATEMENT OF WILLIAM F. BAXTER

Mr. Chairman and Members of the Committee:

I am pleased to appear this morning to present the views of the Department of Justice and the Administration on S. 1256, a bill entitled the "Retail Dealers' Agreement Act." For the reasons set forth below, we strongly oppose this legislation and recommend against its enactment.

S. 1256 would create a complex federal regulatory scheme covering the distribution of products used in business offices. 1/ It is intended to regulate the relationships between suppliers and dealers of such products, and to allow new dealerships to be established only under certain circumstances. Section 3 identifies four types of conduct that would violate the Act: (1) fraudulently inducing a dealer to enter a dealer agreement; (2) failure to act in good faith in complying with the terms of a dealer agreement, including the furnishing of products and parts in a timely manner; 2/ (3) failure to act in good faith in terminating, cancelling, or refusing to renew a dealer agreement; and (4) failure to provide sixty-day's notice to existing dealers before appointing a new dealer for the same product in an existing dealer's market area. 3/ In addition, while a supplier may terminate or refuse to renew a dealer agreement "for just,

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1/ Although the bill does not define the specific kinds of products covered, the term "dealer" is defined as one engaged in selling products "in any office o[r] business environment," and "product" is defined as any "physical object, software, method or service used in any office or business environment." While it appears from the statement of Senator Exon on introducing the bill, 128 Cong. Rec. S. 5520 (May 21, 1981 daily ed.), that it is intended to apply to office machine dealers, its actual scope could be far broader.

2/ "Good faith" is defined as "the duty of each party to any dealer agreement . . . to act in a fair, equitable manner toward each other so as to guarantee each party freedom from coercion, intimidation, threats of coercion or intimidation, fraud or unconscionable conduct by the other party."

3/ "Market area" means a dealer's geographic area of responsibility as defined in the dealer's agreement or, if not defined in the agreement, the geographic area within 100 miles of the dealer's primary place of business.

good and significant cause," 4/ he may, in the absence of such cause, terminate or refuse to renew such an agreement only by offering the dealer compensation for the value of the lost dealership, including "a reasonable amount for goodwill."

If an existing dealer objects within 60 days to the establishment of a proposed new dealership, a federal district court would decide whether the dealership may be established. Section 3 of the bill requires the court in making this determination to consider "all pertinent circumstances surrounding the establishment of a new dealership in the relevant market," including: (A) whether a new dealership "is warranted by current economic and marketing conditions;" (B) the current and past volume of business for the product in the market; (C) the effect of a new dealership on existing dealers' investments; (D) the permanency of those investments; (E) whether existing dealers are competitive or otherwise performing adequately; (F) the manufacturer's previous representations regarding the future establishment of dealers; and (G) the ability of the objecting dealer to meet existing and future sales quotas if the new dealer were established. The bill expressly provides, moreover, that the desire for "further market penetration" is not itself sufficient grounds to establish a new dealership in the relevant market area.

Dealers "affected" 5/ by a supplier's violation of any of the bill's provisions would be entitled to sue for damages, injunctive and other equitable relief, including attorneys fees, in federal district court, with the court authorized to treble actual damages if it finds the violation to have been "willful".

4/ This term is not defined in the bill.

5/ While this undefined term presumably creates a cause of action for the supplier's existing dealers, there is no assurance that it would not be interpreted as encompassing dealers who sought, but were denied, dealerships by the supplier, as well as dealers who would have an obvious--and anticompetitive--interest in preventing new competing suppliers from being appointed in their territories.

The Department of Justice strongly opposes S. 1256 for several reasons. First, while we are sympathetic to the bill's intended purpose of remedying alleged coercion, high-handedness, or fraud on the part of suppliers of office equipment, we see no reason to enact complex new federal legislation when any alleged abuses that may be occurring can adequately be remedied under existing law. Second, and most importantly, the bill has significant anticompetitive effects. Third, it would have serious adverse effects on consumers of such equipment and could even impact adversely on the business opportunities of current and future dealers in such equipment. Fourth, the bill threatens to raise formidable compliance problems and appears likely to engender substantially increased and unwarranted federal litigation.

Existing Law Is Adequate to Remedy Any Abuses that May Be Occurring

Among the alleged abuses cited in support of this legislation are inadequate parts supplies, lack of dealer input into setting sales quotas, lack of compensation for correcting design defects in new machines, false product claims by the manufacturer, unwarranted appointment of new dealers in a market area and arbitrary cancellation of contracts. However, we have seen no evidence as to the extent to which such practices occur in the office equipment industry or their relative frequency as compared with other industries. In any event, as is the case in other industries, these practices are essentially contractual disputes between suppliers and dealers that can adequately be handled in the drafting of contracts, and they are subject to contract law in the event contracts are alleged to have been breached. 6/ Moreover, to the extent that any of the cited practices might

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6/ Section 1-203 of the Uniform Commercial Code, for example, imposes an obligation on the parties to a contract to act in "good faith" in its performance or enforcement. The Code, which applies to transactions involving goods, has been adopted by every state except Louisiana, and by the District of Columbia and the Virgin Islands.

have anticompetitive effects, the antitrust laws are available to challenge them. I want also to stress that coercion, intimidation and other abusive practices against dealers or consumers are presently covered by Section 5 of the Federal Trade Commission Act as unfair methods of competition or unfair trade practices. 7/ That Act also prohibits false or deceptive advertising or sales tactics that are harmful to consumers. Thus, present law is fully adequate to deal with any sharp practices that may be occurring, and we do not believe that additional legislation is needed.

Aside from existing legal remedies, the free market itself has policing mechanisms that further evidence that no additional legislation is needed in this area. Suppliers have every incentive to promote the sales of their products by their dealers. Because their interests would not be furthered by withholding parts or services, or by otherwise frustrating their dealers' sales efforts, one would not expect suppliers intentionally to engage in such activities. In the long run, dealers simply should and will cease doing business with manufacturers or suppliers whose performance is inferior or detrimental to their sales efforts and carry instead the products of other manufacturers or suppliers.

In short, Mr. Chairman, new, complex and potentially expensive federal regulation is not the answer to alleged problems in the ordinary day-to-day conduct of business in the office equipment industry.

S. 1256 Would Have Significant Anticompetitive Effects

One of our strongest objections to S. 1256 stems from the likely anticompetitive effects of its restrictions on the ability of suppliers to appoint new dealers. The standards set forth in

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7/ 15 U.S.C. § 45 (1976). I would also note that the FTC has recently promulgated a rule that makes it an unfair or deceptive act in violation of Section 5 of the FTC Act for a franchisor to fail to furnish specified information to a prospective franchisee in an accurate, clear, and concisely worded, legible written document. FTC Disclosure Requirements and Prohibitions concerning Franchising and Business Opportunity Ventures, 16 C.F.R. §§ 436.1-436.3 (1980).

Section 3 of the bill for determining whether a supplier could market its product through additional dealers are tantamount to entry regulation of a protectionist nature. The issues that could be placed before the courts by dealers objecting to new competition are so numerous, and so particularized, that judges would have to become intimately familiar with everyday business life to resolve them. For example, courts, rather than businessmen, would be making decisions as to whether existing dealers were performing "competitively" or "adequately," whether existing lines of distribution were sufficient to bring products to consumers at reasonable costs, and whether an additional dealership was "warranted" by economic and business conditions.

The bill's protectionist nature is perhaps most clearly illustrated by the fact that the desire for further market penetration does not justify establishing additional dealers. In other words, suppliers would not be able to increase the sale of their products in a given area by appointing new dealers and stimulating competition among them. Such restrictions on the entry of new dealers could permit existing dealers to raise their markups or maintain them at unjustifiably high levels. Thus, the bill has effects that are qualitatively similar to cartelization among dealers because it establishes a condition necessary for any successful cartel--a restriction on new entry.

Determinations as to the desired degree of market penetration and the adequacy of existing dealer abilities or efforts to achieve that penetration should be left to manufacturers or suppliers, not to dealers or federal judges. Dealers have incentives to minimize or eliminate competition, and can be expected routinely to object to attempts to establish new dealerships, arguing that they are perfectly capable of meeting any increased demand or need for further market penetration and that present competition is "adequate." Such activity could unjustifiably protect dealers from legitimate competition and ultimately harm consumers. 8/

S. 1256 Would Have Serious Adverse Effects on Consumers, and Could Even Adversely Impact on Dealer Business Opportunities

By limiting competition among dealers, the bill would have obvious adverse effects on consumers. But consumers would also pay for other inefficiencies in the distribution process that might result from the restrictions on suppliers' abilities to appoint and terminate dealers. Simply stated, S. 1256 would make it more difficult for office equipment suppliers to establish and maintain the most efficient and effective dealer networks. While suppliers generally attempt to minimize inefficiency in the distribution of their product, suppliers faced with almost certain lengthy legal challenges to their business judgment to terminate or not renew certain dealers may opt simply to retain inefficient dealers. Ultimately, consumers would foot the bill for the costs of these inefficiencies.

Suppliers may also respond to the bill's restrictions in other ways that would harm not only consumers, but also existing or would-be dealers in office equipment. For example, the prohibition against appointing new dealers to achieve greater market penetration may result in suppliers appointing only large, established dealers, and in non-renewal of existing dealers who are presently performing adequately but who are viewed as unlikely to expand their operations. When feasible, suppliers might even elect to integrate forward and to perform functions which independent dealers might otherwise perform. Again, economic efficiency will be impaired if preferable distribution methods are abandoned in response to the bill, and consumers, as well as some existing dealers, will pay the price.

8/ We recognize that Section 8 of the bill contains a so-called "antitrust savings clause" that states the bill does not repeal, modify or supersede any federal or state antitrust law. However, this does not alter the fact that the bill's entry restrictions themselves may have serious anticompetitive effects even if affected parties do not violate the antitrust laws.

The Bill Would Pose Serious Compliance Problems and Would Likely Lead to Extensive, Expensive Federal Litigation

Many of the bill's provisions and definitions are ambiguous. It is not clear, for example, which dealers of what kinds of products or services are to be covered. Moreover, to the extent that the bill's requirements that parties to dealer agreements act in "good faith" toward one another are intended to go beyond contractual provisions and existing legal requirements, they present even further serious questions as to when parties would be in compliance with such unspecific requirements. The bill's criteria for judging when suppliers may add or remove dealers are vague, extensive and complex, and will also lead to substantial uncertainty as to compliance. This uncertainty, and suppliers' loss of control over their distributional arrangements in the likely event of dealer objections, can only lead to increased and expensive litigation.

Furthermore, the prospect of treble damage recovery is likely to encourage dealers to litigate far more frequently than they currently do. Thus, litigation may be encouraged over relatively minor disputes arising from ordinary business dealings involving *de minimus* amounts of commerce such as, for example, minor contract provisions involving the timeliness of deliveries or the adequacy of service. As a matter of course, the expense of such litigation will be passed on to consumers in the form of higher prices. And the delays that stem from litigation will effectively preclude a supplier, even if eventually vindicated in every respect, from responding quickly and effectively to marketing needs and changing market forces--a needless sacrifice of the flexibility that is one of the most basic advantages of a competitive market system.

Conclusion

Mr. Chairman, enactment of S. 1256 would constitute unjustifiable governmental interference with private contractual arrangements in the office equipment industry in an attempt to remedy alleged abuses that can be handled adequately under existing law. Moreover, the bill has significant anticompetitive features and creates serious inefficiencies that can only work to the detriment of suppliers and of consumers in the form of higher costs. Finally, S. 1256 would create serious compliance problems and lead to increased litigation in the already overburdened federal courts concerning issues that are more properly considered under state contract law. In short, there is simply no justification for the kind of far-reaching and disruptive regulatory scheme envisioned by this bill. Accordingly, the Department of Justice strongly objects to this legislation and recommends against its enactment.

I thank the Committee for its attention.

Senator HEFLIN. The next witness is Mr. David Clanton, Commissioner, Federal Trade Commission.

Mr. Clanton?

TESTIMONY OF DAVID A. CLANTON, COMMISSIONER, FEDERAL TRADE COMMISSION

Commissioner CLANTON. Mr. Chairman, I also will briefly summarize my position and submit my testimony for the record.

Commissioner CLANTON. I would indicate at the outset that the Commission's position on this legislation is very similar to that of the Department of Justice. We feel there are at least two basic concerns involved.

The first goes to contractual relations between suppliers, dealers, and retailers. Is existing common law and existing State law adequate to deal with these transactions or should we enact a Federal cause of action to attempt to resolve these types of matters?

I think our feeling is that we have not seen—and I understand the arguments that have been raised and the statements that have been made here today—evidence that indicates that there has been a systematic failure of the State courts or, alternatively, that creating a Federal cause of action would substantially reduce the time for litigation or redress more effectively some of the concerns with respect to failure to perform on contract, fraud, and so forth, that the bill addresses.

The other concern is providing the right of notice to dealers if they are going to be terminated, have their territory modified, or in any other way be affected by the actions of the supplier. This would give the courts a fairly lengthy list of criteria to consider in determining whether in fact a dealer was being dealt with fairly, whether there was a need for additional competition, and so forth.

Our concern with that provision is that it focuses away from competitive concerns and primarily addresses concerns that are involved with the two parties at issue, or maybe several parties at issue—in other words, private contractual dealings.

We think it would be very difficult for a court to attempt to substitute its own business judgment, which in fact these criteria would tend to do. It would require the court to look at these various issues and determine whether there was adequate compensation, whether a supplier really did need to expand his market, all of which are things that the courts, and I must confess even the Federal antitrust agencies, do not do on a regular basis. I think the courts would find it very difficult to make those kinds of rather sensitive day-to-day kinds of business judgments.

We also feel that it could have the effect of inhibiting future supplier needs to bring about a more innovative, more efficient distribution system. I think, as we all know, the competitive process is one that does not remain static, that changes frequently are occurring. To, in effect, put into place a scheme which would encourage litigation and probably discourage suppliers from taking rather prompt steps when they see that there is a change in the market would have the undesirable prospect of increasing litigation and injecting more rigidity into the whole distribution scheme.

In addition, we think that the legislation would encourage additional Federal court litigation, which is certainly not a reason for opposing the legislation as such. But, in the absence of compelling reasons to have a new Federal statute addressed to this particular industry, we feel that there has not been a case made out for extending or passing this kind of legislation.

With regard to the point that was made earlier with respect to the Automobile Dealers "Day in Court," I cannot speak to what exactly the impact has been, but it does not go as far as this legislation. That bill was primarily designed to deal with problems of contractual abuse, contractual irregularity, and provide a Federal cause of action. It does not, however, provide a right of notice or a fairly lengthy scheme in the legislation designed to determine whether a new dealership is justified.

I would point out with respect to the Federal Trade Commission that we have authority to deal with anticompetitive kinds of concerns, and with unfair and deceptive practices. I would point out that in the area of franchise operations the Commission has taken action, namely, the franchise disclosure trade regulation rule that the Commission adopted approximately 2 years ago.

Under that scheme, all franchisors are required to provide a disclosure statement to dealers indicating what their rights and obligations are, what kinds of assistance the dealer could expect from the supplier—in essence providing the information they need in advance to make a relatively informed judgment about whether they should go ahead.

Obviously, that trade regulation rule doesn't deal with all the issues that are here, but it certainly does provide a vehicle for providing up front some of the kinds of disclosure that may in fact be a problem here and for dealing with it in a way that attempts to address any problems of deception, fraud, and so forth.

The Commission doesn't enforce that rule on the basis of individual disputes. We are looking primarily—our enforcement responsibility is addressed—to whether there are systematic problems.

Either the statements are not being provided or the manufacturers are systematically not providing correct information.

To the extent there are problems of fraud and deception, we think that approach—and I might say it is paralelled by many State laws as well—helps to address that concern.

Above and beyond that, however, we simply don't think that there ought to be, and we think it would be highly undesirable, to inject a new judicial scheme that would attempt to rearrange competitive relationships among dealers between suppliers and dealers and for which the primary focus is not competition, but rather the question of the impact on a given dealer or a given group of dealers. We think that focus really is unfortunate in redirecting the attention from where it ought to be—on competition in the market as a whole.

That is all I have, Mr. Chairman. I will be happy to answer questions.

Senator HEFLIN. Senator Exon?

Senator EXON. Mr. Clanton, correct me if I am wrong, but let me phrase my questions this way: Many independent small businessmen are going out of business every day, not because of their poor performance, but due to unfair treatment at the hands, principally, of foreign manufacturers.

The dealers, as I understand it, asked the FTC to investigate, but the FTC said that it could not. Is this true, or is it not, and what role can the FTC play in this if the bill that we are considering today, S. 1256, does not eventually become law, or something like it?

Commissioner CLANTON. Senator Exon, to the best of my knowledge, the discussions that our agency had with those complaining dealers went to the question of whether the FTC would step in on behalf of dealers and attempt to take some action either under our antitrust authority or under our consumer protection authority and prevent the suppliers from arbitrarily terminating or breaching contracts. I am not privy to those, what I think were oral discussions. I am not aware of any written petition that was submitted, but it was done a couple of years ago, a year or two ago, to the best of my knowledge.

I think the answer that was given was that the Commission, while it has an obvious concern of dealing with broad competitive situations, was not in the position, nor have we ever been, of attempting to intervene in what appears to be private contractual disputes. I believe that was the explanation that was given to these petitioners, namely, if there appeared to be serious competitive problems across the board affecting competition in the market that that would be a basis for us to act, but on the basis of the information we had, it appeared to be a request to get involved in individual contractual situations that we really don't have the authority or the resources to become involved in.

Senator EXON. Mr. Clanton, are you telling me that you think it is not the responsibility of the FTC to become involved, or don't you think you have the authority to become involved when small businessmen are being taken advantage of?

You certainly are not indicating in your testimony, are you, that you think that under the present practices, especially with foreign manufacturers, that the independent businessmen in the United States are being treated fairly?

Commissioner CLANTON. I think we certainly have the authority to protect small business, but what I was saying is that the principal focus in our statutory mandate is to look at the larger question of the degree of competition in the market, whether we are talking about the manufacturer side or the dealer side, and see whether practices are impairing that.

There are a lot of private contractual disputes, not only in this industry, but all across the board, which we really are not directed to resolve.

There is no practical way for the Commission, nor do I think it would be desirable for the Commission, to become involved in those kinds of disputes. We would essentially be involved in doing nothing else, because of the nature of the problem, not only in this industry but a whole host of others across the board.

It seems private remedies are the best way, unless there is an overriding concern raised.

To the extent that the manufacturers present a different issue, and I am not aware of that, but I think then the question is what is the best way to enact a piece of legislation that goes across the board to deal with everybody in the kind of fairly broad, extensive fashion that is being done here.

It seems to me to be a tremendous case of overkill. But I must say that I have not heard of evidence that would indicate the problem with the foreign manufacturers is so substantially different or unique that it needs to be addressed by this type of legislation in any event.

Senator EXON. Mr. Clanton, I only asked the question to you about the FTC to show that these small businessmen around the United States have tried very hard through the existing mechanisms, if any, for remedy in this area, and as I understand their position, which they undoubtedly will be testifying to in just a few moments, they have tried every avenue they could, and certainly I am not sure that they want the FTC involved.

Once again, I say to you, Mr. Clanton, that this is legislation that simply allows the individual businessmen standing in the Federal courts, and we think and they think that that is critically necessary to protect a very fundamental part of our free enterprise system, the independent small businessmen in this area of our very complex business society.

Why are you, a commissioner of the FTC, here opposing something that would simply allow us to pass legislation to allow these people to have standing in the court?

Commissioner CLANTON. Well, I guess there are two issues. One, the question of whether we as an antitrust and consumer protection agency ought to play a direct role, and second, whether there ought to be a private right of action. I think from the standpoint of the antitrust laws, with all due respect, that any effort that is being made to in effect restrict the opportunity of parties to arrange business transactions as they see fit, so long as they are not abusing any market power they might hold and so long as they are not reducing the level of competition across the board, is something that we ought not to get involved. To the extent we would get involved on the opposite side of the coin, I think it would be inconsistent with the whole purpose of the antitrust laws.

On the question of a private right of action, I guess I come back to the extent to which, if you simply had a statute that didn't provide, for example, this right of notice and an opportunity to essentially block a new competitive dealer from coming in—in other words, pass legislation more like the Auto Dealer "Day in Court,"—obviously I would have less concern.

I don't think we would be in a position even then to endorse that legislation. I am not at all sure that the Automobile Dealers "Day in Court" Act, from my limited experience, or from any empirical evidence, has provided the kind of relief that the dealers may have thought.

But that simply goes to the question of encouraging more litigation and there certainly is a fair amount of that. That is not the answer. I think it has been mentioned here today that one of the problems with State court actions is that the dealers don't have the resources to fight, they don't have the resources for time-consuming litigation. Admittedly, that is a problem in litigation, but it is one that will occur at the Federal level as well as the State level.

I don't think the answer is to go the next step and effectively put in a provision that attempts to litigate the question before any kind of market change can be made. The effect of that is simply to deter unnecessarily more productive and more efficient relationships. There is no way for this legislation to effectively distinguish between good terminations and bad terminations. I think the kind of criteria entailed in such a determination indicates how complex that whole situation is. It would inject the courts into a very extensive involvement in business judgments.

Senator EXON. Mr. Clanton, then is your testimony here today that the FTC is basically powerless to act? These small businessmen have no other remedy, and that you feel whatever remedies are now available to them, which have not been effective, should not be expanded upon. Are you simply saying that there is no problem?

Commissioner CLANTON. I am not saying that there is not. Certainly the participants believe sincerely there is a problem. Obviously they believe that, or they wouldn't be here.

From the standpoint of the FTC, we are not powerless to act, but I would only say that our authority extends on the one hand to deceptive and fraudulent types of practices, which we do have, and which the franchise disclosure rule is designed to deal with.

On the other hand, on the antitrust side, I think the focus of the antitrust laws is such that it would really be inconsistent to have the agency get involved day-to-day—in attempting to resolve dealer-supplier contractual relationships and trying to prohibit suppliers from making changes which may well be procompetitive.

Senator EXON. I certainly gave you, Mr. Clanton—the previous witness and yourself—an opportunity to put this in a context. Those of us who want standing for the small businessmen in the courts are not appealing to the Federal Trade Commission to get involved. I am not for that. I don't think that the dealers are basically for that. I think that is an old cliché that the bureaucracy has used time and time again to thwart the efforts of those who merely want a standing in court.

I am just wondering how much you at the FTC understand their problems. The Commission letter of December 10, 1981, to the Commerce Committee Chairman Packwood said that it was not aware of any significant information indicating that existing remedies are inadequate.

Now, for your information and that of the FTC, I would simply state that the hearing record in the Commerce Committee is full of such information. Have you or any member of the FTC had an opportunity to review that record, and does it change your position?

Commissioner CLANTON. Senator, I think the point we were trying to make is a question of whether the nature of the problem here is really substantially different from the kinds of dealer-supplier questions that arise across the board in all industries on a daily basis. I mean the very nature of the relationship is such that it is likely to provide conflict at times and disputes whether contractual provisions have been carried out.

The question is whether there is something dramatically unique in the market, whether the market structure is substantially unique from a competitive standpoint that it justifies intervention.

No; we didn't see any evidence in that basis.

Senator EXON. Are you telling me the FTC is not aware that foreign manufacturers have captured an overwhelming share of the supplies that flow into what we call the market—machine dealers' market area? I am talking about the Japanese and some European manufacturers. You are aware of the fact that there has been a dramatic change in dealing with an American manufacturer, and dramatic change that has come about in the last 10 to 15 years as far as foreign manufacturers are concerned.

I am simply saying that it is one thing for these small independent businessmen to deal with American manufacturers. It is quite another to deal with foreign manufacturers.

Can you appreciate the difficult position that that puts them in?

Commissioner CLANTON. I can understand the difficulty in day-to-day dealings is greater. I don't disagree with that. I guess your point you made earlier, Senator, about foreign manufacturers increasing their market share may or may not be healthy vis-a-vis other domestic producers. On the other hand, that issue doesn't seem to me to be resolved by this legislation.

In fact, this legislation could have the undesirable effect, if you want to look at it that way, of encouraging foreign manufacturers to come in with their own company-owned distribution systems and essentially ignoring or bypassing the kind of dealer relationships they have.

I don't know that we want to encourage that. I don't see the connection between the extent to which they have enhanced their market share and their relationships with individual dealers.

Senator EXON. Mr. Clanton, you have put your finger on the key issue that this bill is seeking to correct, and that is the leverage continually placed on these small businessmen by large foreign manufacturers with the threat that they would come in with their own distribution system and/or setting up some kind of a supply outfit in the United States that would do their bidding. That is a concern to me. I think it should be a matter of concern to you as a member of the FTC, but evidently it is not.

I have no further questions.

Senator HEFLIN. Thank you, Mr. Clanton. We appreciate your testimony.

[The prepared statement of Commissioner Clanton follows:]

Prepared Statement of David A. Clanton

Mr. Chairman and Members of this Committee, I appreciate this opportunity to appear before you today on behalf of the Federal Trade Commission to express the Federal Trade Commission's views regarding S. 1256, "Retail Dealers Agreement Act."

S. 1256 attempts to provide retail dealers of office equipment with a specific set of sanctions protecting them from supplier actions that may adversely affect their individual business interests. The Commission opposes this legislation because there has been no demonstration of need that would justify the substantial interference with the competitive process and the consumer harm that may result if this legislation is enacted.

Purpose of S. 1256

S. 1256 is designed to protect retail dealers from the loss incurred when a supplier adds a new dealer to an existing market area or changes distribution methods so that existing dealers are terminated or market areas realigned. Small businessmen claim they are reluctant to risk their time, skill, and financial resources to develop markets for new products or services when a supplier may decide to add new dealers to their territory or turn to existing dealers with greater financial resources. Therefore, they seek the special protection this Bill provides.

Essentially, the Bill attempts to remedy this problem in two ways:

First, it codifies, as federal law, well established common law regarding "fraud in the inducement," as that concept applies to new dealer agreements;

Second, it creates new legal standards and a body of legal rights and remedies that may be utilized to delay or prohibit any changes in a supplier's marketing practices that could adversely affect dealers.

While the Federal Trade Commission is committed to protecting franchisees, distributors and dealers from unfair trade practices, the Commission is opposed to enactment of S. 1256 for two reasons. The existing law more than adequately protects dealers from such practices. Dealers already have the right and the ability to protect their investments by contract. Moreover, even if a dealer fails to negotiate adequate contractual protection, private legal remedies for business torts provide redress for serious abuses. In addition, the federal antitrust laws enforced by the Federal Trade Commission and the Department of Justice, provide protections and safeguards against anticompetitive or other unfair business practices. The Commission is also opposed to S. 1256 because it is clearly anticompetitive. We are specifically concerned that the bill will unnecessarily confer market power on existing dealers and lead to increased inefficiencies in suppliers' distributional networks, inevitably resulting in increased prices to the public.

I would now like to briefly highlight some of the problems inherent in S. 1256.

A Federal Fraud Statute is Unnecessary

A federal statute preventing suppliers from fraudulently inducing small businessmen to enter dealer agreements is clearly unnecessary. Common law, applicable in virtually every state throughout the nation, and existing state statutes, already provide time-tested remedies for this and other types of business torts or unfair business practices. Moreover, there is no evidence that this plethora of existing legal protection has somehow failed to protect dealers from supplier abuses. In addition, the volume of claims generated by this legislation would further burden the federal courts without any apparent benefits to the public. Thus, there is no sound basis for enacting this legislation.

The Newly Created Dealer Rights and Remedies Are Anticompetitive

S. 1256 creates a new set of dealer rights and remedies that would be triggered by any change in a supplier's marketing practices that might adversely affect a dealer. These would include the right to:

- --receive 60 days advance notice of a supplier's intention to establish a new dealership in the market area covered by an existing dealer agreement;
- --seek damage for or sue to prevent any action by a supplier that is not fair and equitable and is not done in good faith; and
- --obtain a judicial determination as to the propriety of establishing a proposed new dealership or any other action by a supplier that might result in the partial or total loss in the value of a dealer agreement.

S. 1256 will have two principal anticompetitive effects. It will deny consumers the benefits of increased intrabrand competition, resulting from the establishment of new additional dealerships and it will tend to result in market inefficiencies and increased costs in maintaining. Needless to say, these increased costs distribution systems will be passed on to consumers.

Under S. 1256 manufacturers and distributors, who heretofore exercised broad independent business judgment in determining or modifying their marketing policies, strategies, and practices, will find themselves unduly restricted by a statute requiring them to give advance notice and/or compensate dealers for the "privilege" of making legitimate business decisions.

This environment may result in suppliers insisting on strict territorial restrictions and limitations in dealership agreements, thus limiting the supplier's obligations to provide notice or pay compensation. Suppliers may also tend to spend greater resources in policing territorial limitations in order to prevent dealers from unilaterally expanding their market areas. As a result, distributional flexibility, innovation and efficiency may be substantially reduced.

Although one of the proposed modifications to S. 1256 would require a court to consider "impact on competition," the lack of well-defined standards in the bill still may result in decisions that conflict with the orderly and effective application of the antitrust laws to nonprice vertical restraints. For example, an antitrust defendant might claim that a restraint on intrabrand competition was justified, not because it furthered interbrand competition, but because the supplier had no alternative under S. 1256.

There are also other reasons why the Commission believes that S. 1256 will lead to increased distribution costs. The requirement that suppliers provide at least 60-days notice of an intention to establish a new dealership in an existing dealer's market area and the existing dealer's right to obtain compensation or to sue to prevent the new dealership will cause inflexibility and delay in a supplier responding to changed market conditions or in improving an inefficient distributional network.

Moreover, the bill would create significant barriers to entry where few now exist. Presently, suppliers can easily add or change dealers in an area. The substantive rights and procedural safeguards in S. 1256, however, will make it more difficult for suppliers to establish new dealerships thus giving existing dealers some degree of market power to raise prices without fear of new entry and increased competition. While suppliers may eventually be able to overcome some of these increased barriers by designing, implementing, and administering distribution systems that minimize or significantly reduce legal risks and obligations, this cannot be done without substantial cost to the distribution system (e.g., execution of written short-term dealer agreements; definition of narrow market areas for each dealer; efforts to document adequate grounds for terminating or refusing to renew existing agreements; and expenses for litigation and attorneys' fees associated with the administration of that network and with adjudication of questions of "good faith"]. Suppliers may also decide to integrate forward into the retail distribution of their own products, simply to avoid the loss of managerial prerogative that this bill entails.

Modification of S. 1256

We understand that certain modifications to S. 1256 are being considered. Although each of these provisions helps to clarify the bill, they do not resolve the Commission's fundamental objections--that S. 1256 is unnecessary and anticompetitive.

Conclusion

Increasing the burden on competition and consumers may be justified when it is reasonably necessary to achieve some other policy objective that provides equal or greater social or economic benefits than the harm it causes. However, that does not appear to be the case in this instance. Enactment of S. 1256 will impede competitive processes and result in higher prices. The Commission is therefore opposed to enactment of this legislation. For your additional information, I have also attached the Commission's earlier Statement on S. 1256, a letter to the Senate Commerce Committee, to my Statement.

Mr. Chairman, that concludes my prepared remarks.

I will be pleased to answer any questions that you may have.

Attachment.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

10 DEC 1981

The Honorable Bob Packwood
Chairman, Committee on Commerce,
Science and Transportation
United States Senate
Washington, D.C. 20510

Re: S. 1256, "An act to regulate interstate commerce by protecting the rights of consumers, dealers and end-users"

Dear Mr. Chairman:

We appreciate this opportunity to comment on S. 1256, a bill to provide statutory protections for business interests and property rights of retail dealers.

The general objective of S. 1256 is to give retail dealers who sell equipment and supplies for use in offices additional legal protections against actions by their suppliers that might be harmful to the value of the dealers' business investments.

These protections appear to fall into three categories. The first concerns use of fraudulent means to induce a dealer to enter into a dealer agreement. The second requires that a supplier act in good faith in performing or complying with a dealer agreement and in terminating, cancelling, or refusing to renew an agreement. The third deals specifically with new legal rights and remedies involving any change in marketing practices by a supplier that might result in loss in the value of a dealer agreement.

The Commission understands that the new dealer rights and benefits created by S. 1256 would include the right to:

--receive 60-day advance notice of a supplier's intention to establish a new dealership in the market area covered by an existing dealer agreement,

--seek damages for or sue to prevent any action by a supplier that is not for just, good and significant reasons and is not done in good faith, and

--obtain a judicial determination of the propriety of establishing a proposed new dealership or any other action by a supplier that might result in partial or total loss in the value of a dealer agreement.

The Federal Trade Commission is sensitive to the interests of franchisees, distributors, and dealers, and to the need to protect these businesses from unfair trade practices by their suppliers. However, the Commission is opposed to enactment of S. 1256. We believe that adequate dealer protections are currently available. In addition, we are concerned that the bill's enactment would increase the monopoly power of existing dealers and would lead to increased inefficiencies in suppliers' distributional networks. The result would be increased prices to end-users for the products covered by S. 1256.

Common law and State statutes provide remedies for fraudulent practices in inducing a person to enter into a dealer agreement, contractual violations, and various torts or unfair business practices. Legislation making these same practices a violation of federal law is largely duplicative. We are not aware of any significant information indicating that existing remedies are inadequate, when considered together with the right of each individual to negotiate appropriate contractual protections. In addition, this bill creates a new standard of "good faith" that seems likely to lead to competitive and consumer harm.

There are a number of ways in which S. 1256 will result in higher retail prices:

1. The requirement that a supplier provide at least 60-days notice of an intention to establish a new dealership in an existing dealer's market area and the right of the existing dealer to sue to prevent the new dealership will cause inflexibility and delay in responding to changed conditions of competition or improving an inefficient distribution network. This inefficiency, and the possibility that a supplier may have to pay compensation to existing dealers before he can make a desired change in his dealer organization, will raise distributional costs. These increased costs will result in higher prices for the products involved.

2. The substantive rights and procedural safeguards granted to retail dealers by this bill would make it more difficult to establish a new dealership. The bill would create what economists refer to as barriers to entry. As the cost of establishing new dealers in competition with an existing dealer increases, the existing dealer can charge higher prices without inducing new entry and increased competition. Thus, again the provisions of S. 1256 would be expected to lead to higher prices.

3. Suppliers might adapt to and overcome some of these increased barriers by designing, implementing, and administering distributional systems that minimize or significantly reduce legal risks and obligations they face under S. 1256. However, these arrangements would impose substantial costs on the distribution system: execution of written short-term dealer agreements, definition of narrow market areas for each dealer, efforts to document grounds for terminating or refusing to renew existing agreements, and expenses for litigation and attorneys' fees. The additional distribution costs imposed by compliance with the "good faith" requirement of S. 1256 would be passed through to consumers.

Increased burden on competition and consumers may be justified when it is reasonably necessary to achieve some other policy objective that provides equal or greater social or economic benefits than the harm it causes. However, that does not appear to be the case in this instance. Enactment of S. 1256 is apt to impede competitive processes and result in higher prices. The Commission is therefore opposed to enactment of this legislation.

By direction of the Commission.

Carol M. Thomas
Secretary

Senator HEFLIN. Next is a panel of Mr. John Kuchta, vice president, Lincoln Office Equipment Co., Lincoln, Nebr.; Mr. Stephen Phillips, president, P&S Business Machines, Inc., Birmingham, Ala.; Don Wilcox, president, Wilcox Office Equipment, Florence, S.C.; Mr. Ken Stephenson, president, Central Office Products, Salina, Kans.; Mr. Merlin Jeitz, president, Cook's, Inc., Watertown, S. Dak.; and Mr. Richard Nelson, president, Ohio Business Machines, Inc., Cleveland, Ohio.

I believe Mr. Kuchta is to be allotted 10 minutes, and the remaining ones 5 minutes.

Senator EXON. Mr. Chairman, if I might compliment the Chairman, you pronounced that name correctly the last two times. Mr. Kuchta is from my home town of Lincoln, Nebr., and he is one of the outstanding dealers there.

If you will permit me, I want to welcome him this morning.

STATEMENT OF PANEL CONSISTING OF JOHN KUCHTA, VICE PRESIDENT, LINCOLN OFFICE EQUIPMENT CO., LINCOLN, NEBR.; STEPHEN PHILLIPS, PRESIDENT, P&S BUSINESS MACHINES, INC., BIRMINGHAM, ALA.; DON WILCOX, PRESIDENT, WILCOX OFFICE EQUIPMENT, FLORENCE, S.C.; KEN STEPHENSON, PRESIDENT, CENTRAL OFFICE PRODUCTS, SALINA, KANS.; MERLIN JEITZ, PRESIDENT, COOK'S, INC., WATERTOWN, S. DAK.; AND RICHARD NELSON, PRESIDENT, OHIO BUSINESS MACHINES, INC., CLEVELAND, OHIO

Mr. KUCHTA. Thank you, Mr. Chairman. My name is John Kuchta, vice president of Lincoln Office Equipment Co., Lincoln, Nebr. I am also incoming vice president of the National Office Machine Dealers Association, better known as NOMDA. NOMDA is a not-for-profit organization enjoying a membership of 5,000 owners of independent businesses and business equipment retailers, most of which are family owned. Our membership markets to and services consumers of office machines, office furniture, stationery, and office supplies. Our dealer members handle such things as calculators, dictating equipment, word processors, addressing equipment, checkwriters, offset printers, duplicating machines, letter openers, shredders, telephone equipment, data processors, virtually anything for the office.

I am here today to discuss specific problems plaguing our industry, and we feel S. 1256 would help alleviate these problems. We believe that it would provide a clear remedy where none now exists to handle disputes without involving the Federal Government or imposing a regulatory burden on manufacturers-suppliers that we represent.

We believe it will deter manufacturers from continuing business practices which are not fair and equitable to dealers while preserving competition in the marketplace. We believe it will reduce the number of lawsuits filed because of the elimination of confusion which has resulted from a lack of standards.

We believe that it will enhance competition in the small business community by strengthening the dealers for the marketing of reliable products.

We are drawing on the precedent, as was mentioned earlier, of the Automobile Dealers "Day in Court" Act, but we are not speaking of other industries in which dealer-manufacturer relationships exist.

The final point, I think, is that we are not requiring the manufacturer to continue to supply a dealer who does not perform.

The Retail Dealers Agreement Act, its cornerstone is good faith. This is good faith both on the manufacturer's and dealer's part. Good faith is a term that we believe sufficiently flexible to provide a remedy for the abusive treatment that the dealers receive as a result of the manufacturer's overwhelming economic power. Because of the power, the manufacturer has not been required to treat the dealer in a fair, equitable, and ethical manner.

By the way, over 20 years of case law referring to the Automobile Dealers "Day in Court" Act again indicate that the courts have had no difficulty in defining good faith in the context of each case presented to them.

Let me give you a personal example of what I am speaking about. I am a Savin copier dealer. They market Japanese copiers. In 1979, Savin presented its dealers with a new contract. This agreement does little, if anything, to promote fair and equitable treatment of dealers. By its very terms, Savin passes all user warranties on to the dealer and there is no recognition of the dealers' efforts in building the market for Savin products.

The agreement states that Savin may terminate the agreement without cause on 90 days' notice. No reason.

No notice is needed if Savin decides to change its distribution system. No notice is needed if Savin decides to issue a new contract to the dealer. In the event of termination, the dealer is only assured of reimbursement of his costs for new, in-the-box equipment. The dealer receives nothing for the good will he has developed and not a penny for the rest of his inventory. Upon termination, the dealer must assign all current sales to Savin, and return parts, books, and service manuals. If the dealer fails to comply for any reason with the terms of the contract, the agreement that he was required to sign indicates that he consents to an entry of an injunction against himself.

By signing the agreement, he also agrees to pay maximum attorneys' fees allowable.

Rather than demonstrating good faith and fair and equitable treatment between dealers and suppliers, the Savin agreement, we believe, is predatory and arbitrary and a graphic example of the type of contract possible when one party holds all the chips.

By making it a violation of Federal law to fail to act in good faith, we see an opportunity for the dealers to attack problems which result from the manufacturer's overwhelming bargaining power.

There are these different areas that this overwhelming superiority relates to: Not compensating dealers for retrofits which are components and design changes to make the equipment operate like it was supposed to in the first place, and not providing dealers with parts and schematics and service manuals to keep the machines operating on a timely basis.

There are other grievances which my associates will relate to you. Dealers and end-users should not have to suffer loss at the hands of suppliers, nor should we have to shield the manufcturers from the need to produce reliable and safe products.

Mr. Chairman, we urge the Judiciary Committee to adopt the language of S. 1256 as amended, and reported favorably by the Commerce Committee on December 10, 1981. It has been suggested that certain sections of S. 1256 as introduced, are somewhat unclear and possibly conflict with antitrust laws. One section of the bill requires the manufacturer to provide an existing dealer with 60 days' notice of any proposal or proposed dealer agreement for dealers of the same produce in the relevant market area. A precedent for such a provision was recently established by the Soft Drink Interbrand Competition Act—15 U.S.C. 3501 et seq.—reported favorably by this committee on March 26, 1980.

This act provides a restatement of the application of the antitrust laws to territorial restrictions contained in licenses to manufacture, distribute, and sell trademarked soft drink products. I am told that the courts are looking to see whether territorial restrictions placed on similar products restrain competition. In making such decisions, I am told, all circumstances of the situation are examined to learn what is happening in the marketplace and to make sure the interbrand competition is thriving. I am not a lawyer, but I am a businessman, and I can assure you that competition in our industry is thriving. Our dealers represent over 350 manufacturers, mostly foreign. Our general counsel, Robert Goldberg, is here today and is available for any questions you may have about the legal precedents of S. 1256.

Opponents have also expressed fears that S. 1256 would burden the courts, and statistics are available for a comparable statute, the Automobile Dealers Day in Court bill, again.

For the first 20 years following the passage of that act, the average number of cases reported annually was 25. The number of automobile dealers in the United States exceeds 30,000. Given this experience, we anticipate a minimal number of lawsuits to arise under S. 1256.

NOMDA represents the office products dealers. We surveyed over 13,000 independent office machine-office equipment dealers with very nice results, which I would like to report. Ninety-eight percent felt the manufacturers and dealers should treat each other in a fair and equitable manner, 94 percent of them say they support the Retail Dealers Act. One-third of them say they are operating under an agreement that has been violated by the manufacturer, and 43 percent have had to correct faulty products at their own expense.

We feel these are proof of the need for S. 1256.

A number of other dealer organizations have endorsed this legislation, the Office Products Dealers Association, the Copier Dealers Association, the Independent Computer Dealers of America, the Data Terminal Dealers Association, the Accounting Machine and Minicomputer Machine Association, the Independent Systems Dealers Association 'and the International Cash Register Dealers Association, to name a few.

On behalf of all of us, Mr. Chairman, and Senator, this bill once and for all would establish a standard of good faith to govern manufacturers' treatment of dealers so as to eliminate threats, intimidation, and coercion. It would help dealers negotiate more easily with their giant manufacturers in development of reasonable sales quotas and other contract materials, and make it possible for dealers to reasonably be compensated for the goodwill they generate, and it would allow dealers to benefit from their hard work and investment while not unfairly permitting the manufacturers from further penetrating growing markets.

I firmly believe the enactment of this legislation will increase consumer satisfaction with the market and strengthen this country's small business community.

I would like to request, Mr. Chairman, that all written material by myself and my five colleagues today be entered into the record.

Senator HEFLIN. Thank you, sir.

Mr. Stephen Phillips, of Birmingham, Ala. We are delighted to have you with us here. We are delighted to bring you Alabamians here to bring commonsense to the scene. We are delighted to have you.

Mr. PHILLIPS. Good morning. My name is Stephen Phillips and I am president, owner, and operator of a small office machine dealership in Birmingham, Ala. I was honorably discharged from the Air Force in 1967, and first worked for Burroughs for 2 years. I had learned how to service office equipment while in the service and decided to use the skills I had acquired there to sell and service such machines when I got out. I began P&S Business Machines in 1969.

I strongly believe that so long as a dealer pays his bills, meets reasonable and fair quotas, services equipment in the field, promotes the manufacturer's name and goodwill, and treats the manufacturer in a fair and equitable manner, the manufacturer has an obligation to treat the dealer fairly and equitably in return.

Let me now take a few minutes to describe my situation to the members of this committee. In the late 1960's, like any other small dealership starting out, I took on a number of lines of office equipment and sold a variety of products. I had no exclusive lines. I sold only open-line products selling what I could get. Gradually, through hard work and careful attention to my growing customer base, I built a good reputation for quality service, and I developed excellent relationships with both commercial and Government end-users.

By early 1975, I felt that I had progressed sufficiently to be able to take on an exclusive line. Consequently, I attended the annual Southeast Region Office Machine Dealers Association trade show and exhibition with the intention of visiting a number of manufacturers regarding an exclusive or franchise product line. At that time Olympia, a German office equipment manufacturer specializing in typewriters and calculators, had only one dealer in Birmingham. I decided to initiate discussions with the appropriate representatives of this company.

One of its sales representatives named Bob Morris told me that Olympia currently had a one-man dealership in the area, but he was not performing. If P&S did a good job and built the Olympia name, Olympia would cancel this other dealer, thus leaving P&S with a truly exclusive territory. For Jefferson County I agreed with Mr. Morris not to take on any competitive lines which might be offered by such companies as Olivetti, Remington, Adler-Royal, and so on. In fact, I dropped the SCM and Victor lines that I had been selling and servicing.

On March 6, 1975, I gladly signed a contract with Olympia which I thought would guarantee me fair and equitable treatment by the supplier. Not long afterward the only other active Olympia dealer in the area was canceled.

Over a period of 6 years, I worked strenuously to build the Olympia name in the Birmingham area. We constantly advertised Olympia's name—on our business cards, our letterhead, billboards, radio, TV, and newspapers. We committed ourselves to building Olympia, not P&S Business Machines. The fact of the matter is that in 1975, Olympia was an off-brand in Birmingham. Building a reputable name for Olympia was an uphill battle every bit of the way. Total Olympia sales in the Birmingham area in 1975 did not exceed $5,000 wholesale. By 1981, I had a turnover of $130,000 wholesale, a 2,600 percent increase in sales in just 6 years. That year, I more than doubled sales.

I estimate that normal growth in my market area would have yielded annual sales of $2 million in 10 more years. I did so well in marketing Olympia's products that I was rewarded with three separate overseas trips to Asia, Scandinavia, and the Caribbean. I never really had a quota to meet for Olympia. While my contract did have a quota, I was told that this didn't make any difference. So long as I did a good job and didn't carry any other lines I was guaranteed my exclusive territory of Jefferson County.

Normally, office machine dealers, like other retailers in highly competitive industries like ours keep their customer lists and employees at arm's length from their suppliers for the sake of protecting these valuable assets. In my case, Morris told me not to worry because Olympia had a rule and a policy that it would not set up a dealer's employee as another dealer, whether in the same market area or not, without the permission of the former employer-dealer. In fact, he said he would never even approach my employees without my knowledge and consent.

My profitable business and bright future started to come apart at the seams on January 14, 1981. I was about to leave for the Inauguration of President Reagan when I was told by my top salesman that he was quitting. That same day my right-hand man and general manager indicated he intended to resign as well, but would stay on until I had returned from Washington. He said he was not going into business with my top salesman, but into the computer software services field. I offered him $40,000 guaranteed to stay, and he said he would discuss it on my return from Washington. I left, entrusting my business to him.

Upon my return from Washington, I found that not only had I lost half my employees, including my top salesman, my general manager, and two servicemen, but that Olympia set them up before I even returned, delivering equipment on the day the contract was signed. Olympia did all this while promising me that it would not establish a competing dealer in my market area and certainly not hire away my employees while I was doing a good job.

In the conversation with Bob Morris not long after this turn of events, I was told that my top salesman had first approached Olympia the previous fall to take on the Olympia line.

I subsequently discovered that my November and December 1980 and January 1981 sales had been far lower than usual because my salesman had been taking orders for equipment from our customers but not filling them so that Action Business Machines could get the business when it was operating in January. Even worse, while I was in Washington, they had secretly photocopied my corporate records, including customer lists, price lists, maintenance agreements, and expiration cards, everything which had made my business successful and profitable. In addition, Mayo had gone on service calls to bring my customers to Action.

Realizing that my pleas for a reasonable explanation of Olympia's actions were being generally ignored by Morris, I called Mr. Sieb Postma, Olympia's vice president, marketing. Postma told me he would stop the decision to set up Action, but he did nothing.

In the face of such abusive and unfair actions, I had no choice but to sue Olympia for fraud, demanding actual and punitive damages of $8 million. At the time the suit was filed, I told Olympia my normal revolving debt to the company, which only amounted to $30,000 according to my dealer inventory plan, would not be paid, but be settled in court. In the meantime, I asked Olympia to put me on a c.o.d. basis.

At this point, P&S Business Machines was still an Olympia dealer. I had over 1,000 Olympia machines in the field, and the equipment needed to be serviced on a regular basis. I had customers with machines on order and deposit checks to reserve them. I had my national account and school bid business.

After the suit was filed, Olympia refused to ship me machines or parts, even on a c.o.d. basis. I had to give back customers their deposit checks for ordered equipment I could not get and send them elsewhere. I no longer was allowed any ship-in business for products sold outside Birmingham but requiring service in my market area, and I lost all my school bid accounts.

Although Olympia now ships me some parts COD, my customers have gradually begun to do business with other dealerships because I cannot consistently obtain the products to meet my customers' needs.

My lawsuit against Olympia resulted in a countersuit for $30,000. After a 1-week jury trial before the Federal District Court in Alabama, the jury awarded me $3 million in damages and said I must repay Olympia the $30,000 which I owed them. The judge in the case, however, set aside the jury's verdict, yet still required me to repay my debt to Olympia. At a new trial, the judge decided after 3 days that Olympia's assurances to me regarding the exclusivity of my market area and dealings with my employees were only promises which do not carry weight in a court of law.

My business lost $75,000 last year, the first time in 13 years I have lost money. In addition, I still owe Olympia $30,000. I cannot sell a sizable inventory of shoddy equipment, parts and supplies, and I am responsible for the court costs in both trials I have just mentioned.

Olympia's actions have also affected my family and employees. My employees have had to take several cuts in pay, and can get no raises.

I urge the members of this Committee to move S. 1256 on toward passage by the U.S. Congress. Had this bill been law when I signed by contract with Olympia in 1975, I would still be running a booming business. Olympia would not have been able to treat me so cavalierly despite my earnest efforts to build its name and reputation in the Birmingham area. Action Business Machines would not have been able to coattail on the goodwill I had generated for Olympia, reaping the profits which P&S Business machines should have received. My future has been ruined. I lived up to all the conditions and rules set by Olympia. All I wanted was what they promised me. Let us not allow the same thing to happen to other dealers who must rely on the promises and assurances of their suppliers.

I would be happy to answer any questions that you may have.

Senator HEFLIN. Thank you, Mr. Phillips.

The next witness is Don Wilcox.

Mr. WILCOX. Thank you, Mr. Chairman. My name is Don Wilcox. I am president of Wilcox Office Equipment in Florence, S.C. My company is a family oriented business started by my father about 30 years ago. He started a small service shop and has since grown to be a full-line office equipment dealer.

We carry the full range of office furniture, typewriters, calculators, and copy machines. In 1963, we started selling copy machines. We took on the Savin line of copy machines 6 years ago. We have done very well with Savin. We won several awards. We placed over 200 machines with them.

In early 1981, I started having problems with receiving my commissions from Savin that were due on national accounts, State, and Government machines, the ones we serviced, and were to be reimbursed by Savin for our services. Numerous telephone calls and letters brought no response from Savin to my problems.

The bill that Savin owed me totaled nearly $35,000. In July, 1981, I thought the only way I could get their attention was stop paying my bills, which I did. Within 6 months, I received 90 percent of the commissions due me, and I paid Savin the difference. This was as agreed to by the manager of Savin.

The credit department was very happy with me. I met my quota with Savin for the numerous years that I had it, but on March 18, I received a certified letter dated March 11 that I was terminated immediately.

This violated the agreement that I had signed with Savin stating that they would give me a 90-day notice. I had no chance to appeal. I couldn't find out what was going on, or why I was canceled.

On April 1, less than 2 weeks after I received my certified letter, Savin sent a letter to my national account, State and Federal account customers stating that I was no longer the authorized Savin dealer, that they were to start dealing with the Savin dealer who was going to take over the territory. He was responsible for service and for them to buy supplies only from the new Savin dealer.

I called the Federal Trade Commission office in Atlanta, Ga., and was told that they could not help me because there was no jurisdiction there, that my only recourse was to go through the courts.

In the middle of April, the regional service manager for Savin sent me a letter stating that they had had numerous complaints about my service. I know of no such complaints. All the customers that I dealt with, I even called them when this happened, and asked them if there was anything wrong, and all of them gave me favorable responses saying they were very happy with my services.

Right after the termination letter, Savin started holding my orders for machines, supplies, and parts. Their state sales representative went to the Savin dealer who was taking over the territory and went around to as many customers as they could find, saying I was no longer the authorized Savin dealer, saying the Savin dealer was now responsible for all services and selling supplies.

I had three service technicians that are factory trained, and parts were fast running out. It has caused me a great loss of business and has put my business in jeopardy. The economy around Florence is not in real good condition as far as the office furniture end, so my Savin line had become my bread and butter, and was about 60 to 65 percent of my business. I have since found out that Savin has canceled dealers across the Nation in the same manner as they have done myself.

In the State of Wisconsin, they have terminated those dealers, but they were forced to take them back on because Wisconsin has a law to protect the dealers in the same way that S. 1256, if it were law today, would have protected me from this kind of abuse from a manufacturer.

Thank you.

Senator HEFLIN. All right.

Mr. Ken Stephenson, of Salina, Kan.

Mr. STEPHENSON. Mr. Chairman, Senators, my name is Kenneth Stephenson and I'm president and owner of Central Office Products, a small dealership in Salina, Kan. In 1953 when I purchased the business our principal office machine was the Royal Manual typewriter.

Later on we entered into the era of the development of the electric typewriter. In retrospect we found that this was a frustrating period of product development through trial and error. Through over a dozen models of Royal electrics we attempted to satisfy our customers needs and yet maintain a reputable and profitable business. One particular model introduced, the Royal 590, primarily for the school market, turned out to be particularly slow, poorly made, and a financial disaster. We had to replace most of these ourselves after attempting many company suggested retrofits.

We were obviously delighted with the subsequent merger of Royal Typewriter Co. and Adler-Triumph as it brought to us some very fine German-made products. What we were later to find out, after costly defending the Royal name for many years and to finally have a product that could be sold and maintained profitably, the parent company took my service manager and top salesman and set up down the street with exactly the same product but the with the Adler name instead of Royal. Loyalty and support was obviously a one-sided agreement.

With the advent of the copy machine we had the opportunity to relieve the same problems but with a different product, a different company name, and a higher price tag for loyalty and support.

Because Sharp of Japan gave us a fine electronic calculator it was only natural that we should accept their first plain paper copier with confidence. Besides, if we waited the product would be offered to a competitor, we were told, as the distribution was separate from the calculator. Besides all the other almost unlimited problems that can occur with a copier, the original could be lost or burned in those early models. This kept us in almost constant threat of suit or total customer alienation.

Because of these problems with Sharp and the heat process we turned to Saxon copiers whose technology voided the use of heat. After purchasing the minimum requirement of five $3,000 units for an opening dealer, we now discovered that these machines would simply not perform as promised. The manufacturer's rep who made those promises, left Saxon and reappeared a few months later with the Savin copier which he said would do all the things that the other one would not do. The only difference this time is we turned down the Saving and it turned out to be a machine that worked. In the meantime another dealer was assigned the territory.

I believe the office machine dealer should not have to suffer because our suppliers are able to use coercive and abusive marketing practices at will.

I am convinced that the Retail Dealers Agreement Act—S. 1256—is vital to the very survival of our industry. With the continued development of more expensive and sophisticated office machines, I'm fearful that the independent dealer will not longer be able to afford to protect the consumer from the manufacturer's product deficiencies. These companies must assume more responsibility for product failure. Certainly the customer is not best served in such an environment.

Senators, in the nearly 30 years since I began in business as a young man out of college, I have tried to treat my customers in a fair and equitable manner. My suppliers have not always been the same with me. I believe this act sets a guideline for such conduct.

Thank you.

Senator HEFLIN. Thank you. The next witness is Mr. Merlin Jeitz.

Mr. JEITZ. Thank you. I am president and owner of Cook's, Inc., in Watertown, S. Dak., which I founded 23 years ago.

My company carries a full line of office equipment, from furniture and office supplies to office machines, including electronic cash registers, copiers, and typewriters. My business is of average size, with 18 sales and service personnel.

For the sake of time, I will skip over a number of things I wanted to say that had to do with sales quotas and manufacturer's misrepresentations, and unwritten contracts, but I would like to explain some of my problems.

Each year, hundreds of new products are introduced for dealers to consider and purchase. Some are tested and some are not. It is natural to ask why a dealer would take machines without seeing them, or testing them. The answer lies in the manufacturer's selling practice, for example in July, 1980, at a NOMDA convention, a new copier was introduced. They did not have models with them. Furthermore, Sharp stated that if orders were not placed immediately there would be a delivery problem in the future. The choice was clear, should I order machines, running the risks in the past, or should I let my competitors buy and market them while I was still waiting for delivery?

Almost every dealer opted to buy the machines, and the manufacturers knew it.

Another inequity is: the practice of establishing new dealers, too. Sharp again named a new dealer in Mitchell, S. Dak., which is 125 miles from my territory and not in my market area. Yet with Sharp's knowledge and encouragement, this dealer established branch offices squarely within my backyard; thus, at no expense to him, the Mitchell dealer reaped the benefits of the good will and advertising that I had generated on Sharp's behalf, all the time, effort and money I used to build name recognition for Sharp in the Watertown area was wasted. I was not given the opportunity to discuss with Sharp why such actions were even taken. Words like "retaliation" are strong and should not be used frivolously. I would like to relate the events which followed my appearance before the Subcommittee on Business, Trade, and Tourism of the Senate Commerce Committee last October and have you draw your conclusions. Several days after appearing before the subcommittee, I was contacted by a representative from Sharp, who expressed concern as to the reasons for directing testimony at them. I explained that other manufacturers were mentioned as well, including Olivetti and Saxon. I was asked, "Why did you say those things about Sharp?" I said, "Because they were true."

Sharp then sent a letter to NOMDA's president, Senator Pressler, Mr. Nelson, and myself refuting Mr. Nelson's and my testimony. The letter closed with Sharp's wish that if I did not correct my statement, NOMDA should disassociate itself from my testimony.

In July, 1981, I closed my Brown County branch office, but did not abandon the territory. Several months later, Sharp approached me, claiming Brown County needed more coverage. I explained that this was temporarily impossible, as I had closed the branch and my people had gone with a competitor. Sharp suggested they might set up another dealer, and had the nerve to ask me my opinion of the two competitors as possible candidates.

The discussion over, I was lulled into a false sense of security, believing that we would continue to be the authorized Sharp dealer in that area. Soon thereafter, a bank, about 35 miles from my office, and that is close, was interested in purchasing a copier. Several different brands were considered and we provided a Sharp demonstration model. When we contacted the bank after the demonstrations to see if a decision had been reached, we were pleased to hear that the Sharp copier had been selected. My pleasure quickly turned to dismay, however, when we learned that the bank had received two quotes for the Sharp copier—mine and that of a dealer out of Brown County.

I immediately wrote Sharp, seeking an explanation. Sharp management replied that this action was company procedure, and reminded me that I had been told another dealer was going to be set up. In response to my argument that in our conversation earlier there was no definite decision made regarding a new dealer, Sharp explained that they did plan to tell me—after the new dealer began selling machines.

The point of this whole story is that Sharp made no attempt to explain what sales performance was expected in Brown County, as if it really would have affected its decision to establish a new dealer there. Moreover, in this case Sharp did not notify me that the dealer was being set up in my market area, which seemed the fair and equitable thing to do, at the very least.

I now wonder to what degree these actions on Sharp's part were cause by my statement before Congress.

Other problems are documented in my testimony. Mr. Chairman, I can say that were the Retail Dealers Agreement Act law today, I would not hesitate to use it to seek redress from these grossly unfair practices from companies such as I have described, which seek to intimidate their dealers and subject them to financial hardships and abuse.

Clearly, a good faith standard would set broad guidelines without unnecessarily interfering with dealer-supplier contracts. You can make this possible with support of S. 1256.

I would be happy to answer any questions.

Senator **Heflin**. Thank you.

Next is Mr. Richard Nelson, from Cleveland, Ohio.

Mr. **Nelson**. Good morning. My name is Richard Nelson, and I am president of Ohio Business Machines in Cleveland, Ohio, and I have been in the business 19 years.

In October of 1981, I testified before the Senate Subcommittee on Business, Trade, and Tourism of the Senate Commerce Committee, specifically on quota problems. Manufacturers have historically used dealer quotas to manage, manipulate, and cancel dealers.

Sharp Electronics Corp. responded to my October testimony with a letter to Senator Pressler in December of 1981. Sharp stated that some of these statements were so grossly erroneous and misleading that Sharp should correct them in the interests of mutual good faith and fair play.

I had stated that Sharp set unreasonably high quotas to keep dealers in line and to provide an excuse for their termination. Sharp stated that this is untrue and an unfair statement by me. Sharp also states that not one dealer was terminated or threatened for failure to meet quotas.

Since December 2, 1981, it is a fact that Sharp has put over 40 dealers on probation and canceled outright at least 15 dealers. It is my understanding that of these 40-plus dealers that were sent probationary letters, those that have been retained were retained on their original probationary status with their situation being reviewed every 90 days. I believe it is stressful to have your employees' and families' incomes and welfare reviewed in this arbitrary fashion.

Sharp pointed out that "The quotas Sharp assigns to its dealers are based on a statistical formula for estimating production sales in the dealers' geographic area which we developed with the advice and approval of the Sharp Dealers' Advisory Council, of which Mr. Nelson is a member."

It is a fact that due to Sharp's unfair and unethical quota allocations, the advisory council suggested fair and equitable allocations for Sharp's approval. But there is an implication that the dealers participated in the establishing of quotas, and that is absolutely untrue.

The gross total of machines that Sharp uses to base its allocations on has always been determined by Sharp, and dealers have had absolutely no say-so or approval or refusal rights.

Dealers have urges Sharp for years to go on a dollar volume quota, but our requests have been denied. Dollar volume would be much fairer and more accurate, but by maintaining the machine model quota system, Sharp is better able to manipulate its dealers. All the Sharp Advisory Council did was direct Sharp to give a fair county-by-county distribution across the United States.

I was chairman of the advisory counsel. I have been fired from the chairmanship and the council itself. I am the only chairman of the Sharp Advisory Council ever to have been terminated, and I don't think it is a coincidence that I was terminated after my Senate testimony.

Even though Sharp had published bylaws for the advisory council that had been rewritten, edited, approved, and authorized by their legal department, they still chose to violate those rules and terminate me.

Sharp denies that they terminated me, but that is not the truth. On May 10, 1982, Sharp sent me a letter asking me to resign. On May 20, I wrote them announcing that I could not and would not resign as there had been no reason for me to resign and that council bylaws indicated that I had a number of meetings remaining to serve as chairman.

Sharp employees, executives, and legal counsel chose to completely ignore my letter, and they formed a new council which I only heard about via the grapevine. In effect, Sharp fired me and formed a new council in violation of legal documents.

Sharp additionally stated that Sharp quotas are established within Sharp production capabilities. It is interesting to note that in 1980 when Sharp had a quota of 83,000 units and they, in fact, only sold 41,000, the whole copier group were rewarded on doing a fantastic job by the president of Sharp. It would be interesting to know why they weren't measured against performance and production capabilities as dealers supposedly are.

In addition, Sharp states that quotas are only used for the measurement of sales performance and for the mutual benefits of Sharp and its dealers. Well, I certainly don't think that all the dealers who are on probation and all the canceled dealers would feel that Sharp's quotas are to their mutual benefit.

At one time I proposed that Sharp eliminate the word "quota" and announce dealer machine goals. Then, at the end of the fiscal year, Sharp would total what had actually been sold and delivered in the United States, and that would be the quota figure that Sharp dealers would measure against. This, of course, would be completely fair because we would be dealing with actual dealer numbers against actual manufacturer's numbers.

Sharp agreed, and then refused to put it in writing.

In closing, there have been no false accusations, and never will be, made toward Sharp. Lastly, I might say that I talked to hundreds of dealers and asked them for their feelings in writing or in person. They have stated to me unequivocally that they agree with this bill. They are afraid to testify for fear of retaliation, as happened to Mr. Jeitz and myself.

In Sharp's last sentence of their letter to Senator Pressler, they state that unless I repeal my testimony that NOMDA should disassociate itself from me. One of the key issues of S. 1256 is that dealers will be allowed the right of free speech and free association.

My family needs this bill, I need this bill, and my employees need this bill, and I would be glad to answer any questions.

Senator HEFLIN. Thank you.

Do you have any questions?

Senator EXON. Yes; I want to congratulate every one of you for the statements you have made here today. It cuts through the heart of the cloud that has been raised on this bill.

I hope the members of the Judiciary Committee and all the members of the U.S. Senate will have an opportunity to read the testimony which you have given here, which has been critically important.

Certainly, Mr. Jeitz and Mr. Nelson, I compliment you for coming here and speaking out, as I know firsthand that there are a great many of your fellow dealers who just feel they can't afford to come here.

The testimony you have given has been right on the point.

One or two things I would like to clarify for the record. It seems to me, Mr. Chairman, that those who oppose this bill have indicated that we are trying to restrain competition. Actually, S. 1256 is designed to help competition, because if we continue on our present course with the foreign manufacturers essentially making the strides that they are attempting to make to get tighter and tighter control on the marketplace, there is not going to be competition, and you are eventually going to see in the United States of America in this important business area a very few people who go into the market without the working of the competition that is demonstrated in this room today in the area that each one of these people represent.

Second, I would like to emphasize once again all of the testimony—all of the testimony—has been with regard to foreign manufacturers, and earlier I made it very clear in my opening statement, I think the prime area of use here has come from the massive influx and influence of foreign manufacturers into this very competitive industry.

One question that I would like to ask each member of the panel, and in the interests of time, Mr. Chairman, I hope they can keep their remarks brief.

Senator HEFLIN. Would you like them to submit it in writing?

Senator Exon. No; I would not like to submit it in writing, but on the record, Mr. Chairman.

Each one of you, I am posing this question to you: Do you or your organization seek directly or indirectly through S. 1256 or otherwise to "create a complex regulatory scheme covering the distribution of products used in business offices"?

That statement was made here by the Justice Department. I will start with you, Mr. Kuchta.

Mr. KUCHTA. That is not our intention, Senator. Our intention is to set up a situation where we will be treated fairly and equitably so that we can provide the best possible products and services to the consumers we serve.

Senator EXON. Have you heard any talk among your organizations, the dealers therein, with regard to creating a regulatory scheme?

Mr. KUCHTA. No.

Senator EXON. Mr. Phillips?

Mr. PHILLIPS. No, sir; we don't want to increase Federal regulatory schemes at all. All we want, really, is to have a set of rules that are actual rules to play by.

Senator EXON. Mr. Wilcox?

Mr. WILCOX. No, sir, Senator, we don't want to set up a regulatory agency. What we are trying to do is protect small dealers like myself and end consumers from being—from having inadequately tested machines being put out on the market that may cause undue and extra expense to dealers like myself and consumers buying products that do not perform the way they are specified. In my particular case with Savin, by terminating me, my customers who had bought machines from me or are renting machines from me may deal with only one Savin dealer instead of two, and in considering that Savin has dictated to my national, State and Federal accounts not to do business with me. There is a loss of competition.

The customers are losers in the end by not getting the best possible products for the lowest possible price.

Senator EXON. Thank you. Mr. Stephenson, are you for creating a Federal bureaucracy for regulatory schemes?

Mr. STEPHENSON. No, sir, Senator.

Senator EXON. Mr. Jeitz?

Mr. JEITZ. I am not, as stated before. We would like to have increased competition, and this would increase competition and certainly would not burden the courts.

Senator EXON. Mr. Nelson?

Mr. NELSON. This association, this panel, and myself are not interested in regulation and further bureaucracy. We are interested in creating competition. There is not one copying machine manufactured in the United States of America for dealer consumption. We don't have a death wish. This is not a protectionist bill. What we want is a track to run on, and fair play.

I might add that Attorney General Baxter stated this morning that the State courts could handle this problem. The diversity rule is always sought by the manufacturer when a dealer takes them into a State court, and you end up in Federal court in 5 seconds anyway. That happened to me last week. They know there is no Federal rule, and that is why they get us into Federal court, and that is why we are always losing.

Senator EXON. Thank you.

On this State court situation, I am not a lawyer, but it seems to me the problem is twofold. If no written contract exists, the dealer's complaints are dismissed, and if there is a written contract the dealer has few rights under it because of its one-sided nature. Existing State laws cannot be viewed as adequate by any fair and objective person by analyzing the situation that confronts you small businessmen.

Thank you for coming. I have no further questions, Mr. Chairman.

Senator **Heflin**. Thank you.

[The prepared statements and submitted material of Messrs. Kuchta, Phillips, Wilcox, Stephenson, Jeitz, and Nelson follow:]

PREPARED STATEMENT OF JOHN J. KUCHTA

Good morning. My name is John Kuchta, Vice President of Lincoln Office Equipment Company in Lincoln, Nebraska. I also hold the position of Vice President, one of four national officers, in the National Office Machine Dealers Association.

Lincoln Office Equipment has been in business for twenty-five years. I have, like many office machine dealers today, followed in my father's footsteps to take up his role as a reliable supplier of quality office machine products as well as service to end-users in our community. I carry a fairly wide range of products, including copiers, typewriters, calculators, word processing equipment, and small computers. I represent both foreign and domestic manufacturers, such as Canon, Minolta, Savin, Olivetti, Victor, and Lanier. I have 55 employees, and compared to other office machine dealerships around the country, my business could be characterized as larger than average.

Let me put on my NOMDA officer hat for a minute so that I can make some observations about the National Office Machine Dealers Association and the specific problems plaguing our industry. NOMDA is a non-profit organization of over 5,000 member-owners of independent office machine companies, most of which are family-owned. Our members are located in all 50 states, as well as ten foreign countries. These independent dealers work together in a common effort, educating each other in the latest management, marketing, and technical procedures. Thus, they can best run and operate their individual small businesses.

Our membership represents at least 70% of those independent dealers who primarily market office machines, although many also offer lines of furniture and other office supplies. These businesses carry lines of products which include copiers, computers, typewriters, electronic cash registers, desktop calculators, dictating equipment, word processors, addressing equipment, checkwriters, offset printers, duplicating machines, letter openers, shredders, telephone equipment, data processors, labelers, scales, lettering machines, collators, staplers, laminators, microfilmers, microfiche units and many other products.

How does the small independent office machine dealer fit into the overall economy of the United States? Traditionally, the large domestic manufacturers of office equipment, whose names have become synonymous with the industries they dominate, have marketed their products directly through their own individual sales forces. Some of the companies which have chosen the direct approach include Xerox, IBM, NCR and Texas Instruments. As you might well imagine, the sales forces within these corporations are fairly sizeable, and dealer competition with them is considerable.

The majority of manufacturers of office equipment have seen the advantages of marketing through a network of independent dealers located in every state and locality in the country. These dealers have close relationships with other small businesses and consumers in their respective market areas. They can market a wide range of product lines, although their choice of products is often governed by manufacturer marketing strategies for the area concerned. Some dealers carry only office machines, some only office furniture, some only office supplies and some any combination of these. Our main concern, however, is office machines.

Techonologically advanced, high priced office equipment has traditionally been the exclusive domain of the large manufacturers selling through branch offices. The independent office machine dealer, on the other hand, in the past, has limited his involvement to the less sophisticated, less costly products. In the last decade, we have seen more and more dealers using their traditional typewriter/calculator businesses as a foundation to expand into such high technology areas as word processing and mini-computers, adding photocopiers to their line of products along the way. By selling their knowledge and service capabilities, these dealers have proven that they can compete effectively against those major manufacturers using a direct sales force. Recently, in fact, some of these manufacturers, including Xerox, NCR, and IBM, have decided to experiment with the proven dealer approach to try to boost sales. We believe these moves are simply another indication that marketing through dealers is the best route to higher sales and better service.

Let me take this opportunity to describe to you our typical member. He is a small, independent businessman, probably carrying on in the footsteps of his father and his grandfather before him. His family may have been a fixture in the community anywhere from fifty years on. The typical gross sales volume of our members averages in the range of $500,000 to $1,000,000 per year. The organization usually numbers ten to fifteen employees; several are devoted to the sales of the products, but the majority are dedicated to service and customer satisfaction for those products.

The independent dealer, in developing the right mix of manufacturers he wishes to represent, can choose from among many. Increasingly, however, they are of foreign origin, particularly Japanese. As far as the dealer is concerned, there are only a very few U.S. companies producing office machines competitive with foreign firms in today's marketplace. Some of these foreign companies are European, such as Adler-Royal, Facit, Hermes, Olivetti and Olympia. However, Japanese firms now provide the majority of dealers' product lines. These firms comprise such giant companies as: Canon, Mita, Konishiroku, Minolta, Ricoh, Savin, Sharp, Silver-Reed, Sony and Toshiba, just to name a few.

Incredibly, the problems which my colleagues will discuss today did not even exist ten years ago. When Senator J. James Exon, a former office machine dealer in Lincoln, Nebraska, sold his business in 1970, he did not carry a Japanese product in his store, only because they had yet to enter the marketplace. However, today that same business attributes more than fifty percent of its revenues to Japanese products.

The entry of the Japanese in the office machine industry has had the effect of virtually eliminating American companies as a factor in dealer-sourced business, particularly in the eyes of those customers seeking lower volume, less costly machines. Not unlike our country's dependence of foreign oil, dealers today must look beyond our borders for viable products to market. In 1979, imports of business machines and parts from Japan alone totalled more than $1,000,000,000. Moreover, more than 70% of such products as photocopiers, duplicating machines, electronic cash registers, desktop calculators and non-portable typewriters handled by dealers come from abroad.

In the case of photocopiers, the Japanese entry into the U.S. market was a direct result of a void created by the industry giants.

Small businesses could not afford large volume, high cost copying machines for their minimal use. Recognizing this vacuum, the Japanese and European firms began developing attractive, low cost machines for small volume usage. The first wave of these with their flashing lights, pretty colors, and fancy buttons flooded the country before their designs had even dried on the drafting tables. Realizing that innovations and new features were vital to maintaining a competitive edge, the manufacturers began to introduce new products as rapidly as possible, leaving final product testing to be done in the end-user's establishment. To carry out this marketing strategy and at the same time minimize capital expenditures, the foreign firms looked for an existing marketing arm in the U.S. The independent dealer, who had previously demonstrated his abilities with typewriters and calculators, was the logical choice. In addition, dealers had already established service organizations, an extremely costly venture for a foreign manufacturer.

Over the past several years, such efforts by Japanese and other manufacturers have served to create a significant asset position for them in the U.S. marketplace quickly and inexpensively. It has been accomplished by means of a unique combination of product innovation, rapid introduction of products into the market, and competitive pricing. However, without the aggressive marketing and reliable service of the independent dealer, their success would not have even approached the level they currently enjoy. The resulting dependence of dealers on foreign products without alternative sources of supply has allowed these manufacturers to acquire inordinate bargaining power.

Let's look at the independent dealer for a minute. By the time a dealer is successful, he has often invested considerable sums in his business over a period of time. Typically, he purchases his products on net 30 days financing. All product warranties are transferred to him, obligating him to maintain sophisticated, up-to-date service facilities necessary for end-user satisfaction. A lease on a building, personnel and training, advertising and many other costs comprise a major expense for the dealer. Furthermore, he has the additional responsibility of paying bills as agreed, meeting established quotas, promoting the name and goodwill of the manufacturer and treating the supplier in a fair and equitable manner. One can see that the dealer has much at stake as he seeks to develop his business.

This said, the stage is set. In an environment in which relatively few, mostly foreign, manufacturers control a substantial share of the marketplace, major office machine suppliers (particularly the Japanese companies) secure in their markets and dominance over the dealers, begin to treat their dealers unfairly. They have full knowledge that their dealers' options are severely limited, and exploit that knowledge to the hilt. What's more, fair treatment entails costs, and it is not required by law. On the other hand, the small dealer has, over time, invested substantial sums of money in his office machine dealership, as well as developed a name for the manufacturer. Unfortunately, with limited bargaining power against the big companies, he has no way of protecting this asset which a supplier can destroy at the drop of a hat through termination or non-renewal. What's worse, even success is not adequate to make this asset grow and prosper, as the supplier will often seek to use that success to further solidify its position in the marketplace at the dealer's expense. Over the last few years, NOMDA has lost hundreds of dealer members--700 in the past year--resulting from bankruptcies and drastically reduced profits caused by terminations and other abusive actions of suppliers.

Given the context of unequal bargaining power between dealer and supplier, the problems I have alluded to above can be generally catagorized as follows:

1. Lack of good faith by manufacturers vis-a-vis dealers--arbitrary establishment of usually unrealistic sales quotas and their use in a coercive manner; offering no compensation for name recognition or goodwill when a dealer is terminated;
2. Lack of incentive for manufacturers to negotiate in good faith on serious problems of product reliability--doing nothing to rectify inadequate field-testing of new products; delays in parts supplies; false product claims and coercive practices regarding servicing requirements;
3. Saturating a market area with new dealers when it is unwar-

ranted; arbitrary terminations or non-renewals; and unfair competition by the establishment of wholly-owned retail outlets in existing dealers' market areas.

Allow me to explain what we, as dealers, have done to try to put an end to these unfair manufacturer practices. In this way, you can better understand why a legislative remedy is the best, if not only, solution to our problem.

We are very proud of our Model Dealer Agreement which we have suggested that dealers review for guidance when entering into a relationship with a supplier (Exhibit A). The NOMDA Model Dealer Agreement provides that (1) both the manufacturer and dealer will treat each other in a fair, equitable and ethical manner; (2) that the agreement is open-ended, or in other words, continues indefinitely as long as both parties meet their obligations; (3) that sales quotas or standards of performance are mutually agreed upon by the parties as reasonable goals; (4) that problems which develop are resolved through an inexpensive appeal board or arbitration proceeding. If these concepts can be formalized between the parties, then our association and members feel the relationship is on a sound foundation.

Unfortunately, the vast majority of our manufacturers refuse to provide in their agreements for fair and equitable treatment of dealers nor are they willing to include the remaining points of the Model Agreement which I have mentioned.

As a matter of fact, in a recent meeting with a large plain paper copier manufacturer whose name is well-known in this country, we were told bluntly and unequivocably that this supplier did not intend to give dealers fair and equitable treatment, but would continue to make sure "things go our (the manufacturer's) way". Many other manufacturers would agree with this statement, but simply never say it out loud. I am sorry to say that this attitude is widespread, exemplified by the low percentage of manufacturers which have adopted NOMDA's Model Dealer Agreement (27 out of 400 manufacturers).

To overcome this reluctance, NOMDA, for the past four years, has sent delegations to Japan to discuss with foreign manufacturers why their American distributing subsidiaries should be using the Model Dealer Agreement. In addition, the issues I described a minute ago were raised as explicitly as possible. Despite repeated assurances and promises to look into the problems we have documented, very little action has been taken by the manufacturers. After several years of all talk and no action, it seems that their response is clear.

You are probably asking yourselves why dealers have not taken action in the courts to redress their grievances. Certainly, contractual disputes in the past have usually been resolved in such a fashion. Dealers have sought relief in the courts. Unfortunately, because of the unilateral nature of many dealership agreements, a result of manufacturers wielding their considerable bargaining power, dealers have found that their interests are not sufficiently protected by these agreements, and, furthermore, that the courts are reluctant to go beyond them to grant protection.

Moreover, the relevant provisions of common law as well as existing statutory laws are not sufficient to give dealers relief from the abusive practices of manufacturers. Numerous dealers have filed suits charging suppliers with violating the Sherman and Clayton Antitrust Acts as well as applicable laws dealing with fraud and deceptive business practices, with very little success. Cases which dealers may have won in district court, are often overturned by courts of appeals leaving the dealer with a bankrupt business and enormous legal debts. Many office machine dealers have even chosen to go out of business rather than risk the expense of a court battle seeking relief under laws which do not address the dealer-manufacturer problem.

A final option which dealers, through their association, have tried--with no success--is to seek the assistance of appropriate agencies of the U.S. government to focus on these problems. These agencies include the Federal Trade Commission, the Small Business Administration and the Office of the United States Trade Representative. In all three cases, we were told that the remedies available under these agencies were not appropriate to the problems that needed to be addressed.

We are, therefore, left with our last option--legislation to require, once and for all, that office machine manufacturers treat their dealers in a fair and equitable manner. We strongly endorse the Retail Dealers Agreement Act (S.1256) as a measure which assures the dealer an opportunity to secure a judicial determination as to whether an office machine manufacturer has failed to act in good faith in either complying with any of the provisions of his dealer agreement or in terminating, cancelling or not renewing the dealer.

We feel the bill would:

1. Provide a clear remedy where none now exists to handle disputes, without involving the federal government or imposing a regulatory burden on manufacturers;
2. Be a useful deterrent to continued business practices of manufacturers which are not fair and equitable to dealers, while preserving competition in the marketplace;
3. Reduce the number of lawsuits being filed by dealers by eliminating the confusion which has resulted from a lack of standards and from the inadequacies of current laws to address office machine dealer-manufacturer problems;
4. Enhance competition in the small business community by strengthening the dealer's credibility and financial stability in the marketplace as he is given an incentive to invest in his business;
5. Allow dealers to continue their current relationships and contracts with manufacturers, if they so wish;
6. Draw on a precedent established by the "Automobile Dealers Day in Court Act" (15 U.S.C. § 1221-1225), but not speak for other industries in which dealer-manufacturer relationships may exist;
7. Not require a manufacturer to continue supplying a dealer who does not perform;
8. Treat foreign firms no less favorably than domestic manufacturers.

Let me now take a few minutes to explain why I believe the approach adopted in the Retail Dealers Agreement Act is legally-sound and appropriate as a remedy to the significant problems affecting dealers. I will direct most of my comments to what I understand is the Committee's chief interest in this bill, i.e. its potential impact on competition within the office machine industry. First I would like to explain why good faith dealing and reliable products are critical to dealer competitiveness. I will then spell out why the maintenance of "territorial integrity" in the marketplace is important for dealerships to remain viable businesses.

The Retail Dealers Agreement Act embraces, as its cornerstone, the imposition of a good faith standard on both manufacturers and dealers. I would like to elaborate on the concept of "Good Faith". The phrase plays an important part in office machine manufacturer-dealer relations. S.1256 defines "Good Faith" as "the duty of each party to any dealer agreement, and all officers, employees, agents, or other representatives thereof, to act in a fair, equitable (and ethical) manner toward each other so as to guarantee each party freedom from coercion, intimidation, fraud, or unconscionable conduct by the other party".

The good faith test is particularly useful in solving the problem facing the office machine dealer. Primarily, it is a concept familiar to legislators and courts in many areas: from the 25-year old Automobile Dealers Day in Court Act to labor laws to basic tenents of contract law. Specifically, good faith is a term sufficiently flexible to provide a remedy for the pervasive excesses of manufacturers who, insulated by the manifest disparity in bargaining power, have not been compelled to bargain or act in a fair, ethical and equitable manner. These abuses take many forms and, of necessity, must be treated on a case-by-case basis. In fact, the House Judiciary Committee in favorably reporting out the Automobile Dealers Day in Court Act in 1956 (S.1379), stated in its committee report that [T]he existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct." (House Report No. 2850, 84th Congress 2nd Session (1956), 1956 U.S. Code & Administrative News, p.4603).

Establishing a laundry list of prohibited and permitted actions would be counter-productive. No list could cover all the possible forms of abuses; furthermore, loopholes can easily be devised in even the most comprehensive list to defeat the intention of the legislation. Also, such a detailed approach could constitute an unduly restrictive burden on the daily business life of manufacturers. We do not seek to tell anyone how to run his business, only to establish the outer boundaries. S.1256 will establish the basic principles upon which both manufacturers and dealer can base their actions without significant intrusions into the day-to-day decision-making process.

The "good faith" test would not, however, be overly vague. As I mentioned, courts have been interpreting good faith in a variety of contexts for many years. We believe that it is vital to continue the development of a practical standard of good faith that reasonable businessmen can use in their arms-length dealings within the commercial reality they both face.

A useful example is the Automobile Dealers Day in Court Act, which uses a comparable definition of good faith to that in S.1256. Under the Automobile Dealers Day in Court Act, "good faith" is defined as "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one part freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." (15 U.S.C.§§ 1221-1225). Over twenty years of case law indicate that courts have had no difficulty in defining "good faith" within the context of each case presented to them under this statute. In all instances, the courts have been careful to view a manufacturer's actions with an eye toward actual or threatened coercion or intimidation. I do not think anyone would seriously argue that good faith is an inappropriate standard on which to base business dealings. In fact, the experiences of those office machine manufacturers which have adopted NOMDA's Model Dealer Agreement, with its good faith provision, have been positive.

While the examples of manufacturers' bad faith and unconscionable activity are many and varied, two of the most egregious examples are virtually universal practices. First, dealers all over the country are intimidated or coerced, either tacitly or overtly, into signing contracts with suppliers without being allowed to negotiate any of their terms. Of course, the suppliers in most instances are too sophisticated to make blatant threats: instead, coercion is often subtle or couched in non-threatening language. Nonetheless, the threats are real: if a contract which a supplier states has to be returned by a certain time unchanged is not so returned, the dealer may face termination in exactly the same fashion as if the threat of termination had been explicit. Allow me to give you a personal example.

I have been a Savin dealer for eleven years. As most of you know, Savin is an office machine manufacturer marketing Japanese plain paper copiers produced by Ricoh Business Machines Ltd. Savin is a company which works to make sure "things go our way".

This very clear statement of Savin's position provides real meaning to a letter and contract first sent to Savin dealers in 1979, which pays nothing more than lip service to the concept of good faith. The letter (Exhibit B) speaks of a "fair and competitive agreement" that is "equitable" and "in the dealers' long term best interests".

The agreement however "cannot be modified", thus making it impossible for the dealer to raise what he views as his own best interests. The dealer is instructed to sign and return the agreement "unmodified" no later than a specified date; otherwise his orders will not be processed.

The Savin Corporation Dealer Agreement (Exhibit C) does little, if anything, to promote fair and equitable treatment of dealers. By its terms, Savin refuses to stand behind its products or its dealers. There is no recognition of the dealer's efforts in building the market for Savin products. Instead, paragraph 10 provides that Savin may terminate the agreement without cause on thirty (30) days' notice. No notice is needed if Savin decides to change its distribution system (for example, by dropping all dealers) or to issue a new dealer agreement. After termination (paragraph 12), the dealer is entitled only to compensation for his new, unused inventory and any special Savin tools he has purchased. He gets nothing for goodwill and not a penny for the rest of his inventory, even at fair market value. The dealer faces numerous obligations on termination, including assigning all his current sales to Savin and returning parts, books and service manuals. If he wished to service the Savin products he sold, he must buy the manuals. If the dealer fails to comply for any reason, the contract he is required to sign indicates that he consents to an entry of an injunction against himself. He also further agrees to pay maximum attorney fees allowable. Rather than demonstrating good faith, fair and equitable dealing between dealer and supplier, the Savin agreement is predatory and arbitrary, graphically demonstrating the unconscionable activity possible when one party has all the chips.

Let me say a few words regarding the second major example of the manufacturers' failure to act in good faith, which occurs in the context of a termination or non-renewal of a dealer's contract. Manufacturers have consistently refused to recognize a dealer's right to compensation for the goodwill he has generated in building and running his business. As you know, goodwill is a valuable asset, one derived a business' reputation for quality and service. It is intimately associated with continuing favorable customer partonage and based on the length of time the business has been in existence, its average profits and its success. "Goodwill" is perhaps the most accurate reflection of a business' value as a going concern.

A dealer who has built up his business, and thereby established a reputation for himself and the products he carries, has generated an asset of great value not only to his business, but to the manufacturer's product line as well. The inequity of allowing a supplier to terminate or fail to renew a dealership without compensation for goodwill is doubly harsh when it is realized that not only is the dealer deprived of the value of an asset (the dealership goodwill), but the manufacturer, by selling directly or appointing a successor dealer, is effectively stealing an asset (the goodwill toward the product) which the dealer created.

I cannot emphasize enough that one of an office machine dealer's primary goals is to create and preserve an asset in his business, an asset which he can nurture and pass down to his children and his children's children. Unfortunately, many manufacturers use exclusively finite-term contracts (one, two or three years), which makes it possible to terminate or not renew dealers, often without cause. Moreover, with no requirement to act in good faith by compensating dealers for goodwill, termination or non-renewal is neither costly nor difficult. Without S.1256, dealers simply have no remedy, judicial or otherwise, to combat this gross inequity.

By making it a violation of federal law for an office machine supplier to fail to act in good faith in living up to the terms of a dealer agreement, we foresee an opportunity for dealers to attack problems which result from the manufacturer's overwhelming superiority in bargaining power and which seriously erode the dealership's competitiveness, such as:

1. Manufacturer's establishment of arbitrary and unreasonably high sales quotas, without any dealer input;
2. Not compensating dealers for retrofits (improvements after sales to the end-user, required to correct defects);
3. Refusing to reduce often considerable delays in the supply of parts, schematics, reference manuals and other product-related material needed by all dealers to support sophisticated office machinery.

As long as manufacturers can protect their unequal bargaining position and avoid the obligations of good faith dealing, these problems will not only remain, but will increase.

Another major problem area for office machine dealers is the ever-growing failure to provide reliable products. The nature of the office machine industry in the 1980's is quite different from that of the 1960's and before. The number of highly-sophisticated products now on the market is staggering. They require careful maintenance by skilled technicians schooled in the latest developments in micro-electronics, data processing, communication and photo reproduction. A dealer's service personnel must be contunually involved in training so as to be able to handle the rapid, virtually nonstop introduction of products and innovations in the marketplace.

In such an environment, pressure on the manufacture to produce and market quickly a competitive product is unrelenting. Couple this with the ability to pass all warranties on to the dealer and to move to other dealers if necessary, and you see how the manufacturer is free and clear to produce a product, factory-test it quickly (while avoiding testing in the field under normal conditions) and market it through a dealer, who is required to maintain the product at his own expense with minimal support from the manufacturer. To go back to the Savin example, the dealer agreement in Exhibit C provides for a limited warranty to pass to the dealer in exchange for which the dealer must release Savin of any and all claims regarding product performance. By this provision Savin indicates it will not stand behind its products.

As a result of such attitudes, office machine dealers across the country have been increasingly faced with product reliability problems evidenced by:

1. Inadequate field-testing of machines. For example, soon after I had purchased 200 Minolta copiers (Model 101) and sold them to my customers, I was told that Minolta had upgraded the photoconductor drum, which transfers the image from the original to the copy. Since this new drum was not absolutely necessary to keep the machine functional, I was charged $175.00 for each "retrofit kit" delivery and compensated nothing for the labor and other expense to perform the installations. Why did I suffer harm to my business and reputation? Because Minolta had failed to field-test the equipment properly before putting it out on the market.
2. Numerous retrofits on machines necessary to allow them to function properly. Minolta, Canon and Savin have all been guilty of calling on dealers to retrofit machines after they have left the dealer's establishment, at great expense to the dealer.
3. Changes in "preventive maintenance" procedures once machines have been sold by dealers to end-users. Last year, Canon sold me a new copier (Model NP 200). The specifications for this machine provided that a preventive maintenance procedure was necessary on each machine in the field every 10,000 copies. I incorporated the annual cost of such requirements in each of my service contracts with my customers. Four months later, Canon informed me that a "pm" was necessary now every 5,000 copies, in effect doubling my cost of service for these machines without opportunity to double my charges.
4. False claims by sales representatives of the manufacturers as to product performance. The misrepresentations regarding necessary preventive maintenance which I just mentioned are just one example. The Canon sales rep also said the NP 200 had two-sided copying capability. It does not. The Minolta representative assured me that the Model 310 could easily produce 6-7,000 copies per month, but end-users experience has shown that 2-3,000 copies per month is closer to its capability.

Such practices as these hurt not only dealers but consumers as well. Dealers and end-users should not have to suffer financial loss and other damage at the hands of office machine suppliers, nor shield manufacturers from the need to produce relaible, safe products.

Another issue of vital concern to office machine dealers is the way in which manufacturers dilute the existing dealer's principal sales area. Manufacturers accomplish this dilution in two ways: by establishing other dealers in close proximity to existing dealers, and, even more pernicious, by creating in such areas direct retail sales operations which these manufacturers wholly own.

First, let me say a word about dealer sales or market areas. As in S.1256, the dealer views his market area as the "dealer's geographic selling area of responsibility as defined in a dealer agreement, or, if not defined in a dealer agreement, the geographic area, within one hundred miles of the dealer's primary place of business in which the dealer principally conducts its business, including selling the product, servicing the product, and in other ways satisfying the needs of the end-users of the product". Normally, a dealer will sign a contract with a manufacturer to market a given product or products within a generally defined geographic area. In cases where an oral contract exists, the understanding is verbal only.

Most dealers do not have exclusivity within their sales territories, and dealers, who not only accept but thrive on competition, have no expectations regarding exclusivity. Nevertheless, office machine manufacturers customarily assure new dealers that they will take no action to infringe on their new sales areas. The dealer subsequently expends considerable time, money and effort to promote the name of his supplier and build end-user acceptance and demand for its products. The dealer does so with the expectation that he will be able to take advantage of his success in building product goodwill through increased profitability and growth. The dealer seeks to expand and maintain customer satisfaction as his market and sales grow.

Unfortunately, office machine manufacturers often prefer to set up new dealers where existing dealers have had success. In many cases, the supplier chooses not to market through a dealer at all but to set up a wholly-owned operation in a successful dealer's market area. The wholly-owned branch operation obviously has a significant competitive advantage over the existing dealer whose profitability is severely impaired. Often the heretofore successful dealer is driven out of business

Dealers also are beginning to find themselves in competition with retail distributors. In October of 1981, Olivetti began to market typewriters through Sears, the well-known retail giant. The Olivetti Dealer Advisory Council was not forewarned of the new Sears marketing program. This is yet another example of a major office machine manufacturer setting up a marketing operation in an area where existing dealers have created the name recognition and goodwill necessary for successful sales growth. A company such as Sears also has an obvious advantage over the small independent dealer. Because of its size and available capital, Sears is in a much better position than the independent dealer to negotiate a fair and equitable contract. Furthermore, Sears has the unique option of private labelling the product it chooses to market based on a well-known name and reputation, an option not open to the independent dealer.

The dealer has two serious complaints about such practices as these:

1. The manufacturer sets up new dealers in an existing dealer's market area with no apparent consideration of current economic or marketing conditions in that area, or of the existing dealer's success in providing adequately for the end-user's needs. Usually, the manufacturer is simply seeking "coverage", and sales quotas for the existing and new dealers often rise dramatically to a level that is clearly unwarranted.
2. The manufacturer, while telling its existing dealer that his performance is outstanding, establishes a new dealerhip or dealerships in that very same market area without notice whatsoever to the "outstanding" existing dealer. Usually, the existing dealer finds out about his new competition from his customers rather than from his supplier.

These situations, which again illustrate the blatant absence of good faith on the part of the manufacturer, have many variations, such as: establishing a new dealer on the fringes of an existing dealer's principal sales area, and at the same time, requiring the new dealer to set up branches much closer to the existing dealer; existing dealers finding their best customers being visited by new dealers accompanied by the manufacturer's sales representative; manufacturer branches competing head-to-head against that company's dealers after a product has been successfully introduced by the dealer and its brand name widely recognized.

In many cases, this type of action results in termination or nonrenewal of dealers for either failure to meet unreasonably high quotas or for the sole purpose of eliminating competition with a manufacturer's branch operations. As a consequence, competition is, in fact, curtailed, and customer satisfaction is reduced.

We urge the Judiciary Committee to adopt the language of S.1256 as amended and ordered to be favorably reported by the Commerce, Science and Transportation Committee on December 10, 1981. The bill, as originally introduced, was not designed to address the situations and circumstances created by the parties to a franchise agreement. However, opponents of the bill raised the issue of the ambiguity of the original language of S.1256. Therefore, an amendment was proposed and subsequently adopted exempting franchisors and franchisees from the reach of the bill. Senator J. James Exon, the legislation's sponsor, has gone on record several times as stating that S.1256 is designed to solve the problems of office machine dealers and does not extend to other industries. NOMDA supports this intention, and we believe the bill's definitions as amended by the Commerce Committee are sufficiently narrow to address our concerns alone.

I would also like to comment on the provisions of the bill which are designed to allow a dealer to reap the benefits of profitable growth in a market area. It has been suggested that Sections 3(a)(4) and 3(b)(1) of S.1256 as introduced are somewhat unclear and possibly conflict with the antitrust laws of the United States.

Section 3(a)(4) requires a supplier to provide an existing dealer with 60 days notice of any proposed dealer agreement for dealers of the same product in the relevant market area. A precedent for such a provision was recently established by the Soft Drink Interbrand Competition Act (15 U.S.C. 3501 et seq.), reported favorably by this Committee on March 26, 1980. This Act provides a restatement of the application of the antitrust laws to territorial restrictions contained in licenses to manufacture, distribute, and sell trademarked soft drink products. While the Soft Drink Act is much broader than S.1256, the reasons given by the Senate and House Judiciary Committees in support of the bill lead us to believe that Section 3(a)(4) is not an onerous burden on suppliers and will, in fact, prove to strengthen interbrand competition.

Having talked to many other dealers across the country and to some lawyers as well, I am familiar with the dealers' problems and concerns. I know the fiercely competitive marketplace in which we must do business, a marketplace offering products from more than 350 manufacturers, including some 40 plain paper copier suppliers. I am told that the courts are always looking to see whether territorial restrictions imposed on products not of the same name but of similar capabilities restrain competition. In making such decisions, all the circumstances of a situation are examined to learn what is happening in the marketplace and to make sure that interbrand competition is thriving. In our industry, I can certainly vouch for that. S.1256 would further enhance competition in the industry by creating the means to strengthen the asset which dealers have worked so hard to build. NOMDA's General Counsel is here today and is available for any questions you may have about the legal precedents for S.1256. He will be submitting a formal statement for the record outlining such precedents.

Opponents of S.1256 have also expressed the fear that passage of the Retail Dealers Agreement Act will burden the courts. Statistics are available for a comparable statute, "Automobile Dealers Day in Court" Act 15 U.S.C. $ 1221 (1970). An average of 25 cases were reported annually for the first twenty years following passage of the Act. The number of automobile dealers in the United States exceeds 30,000. Given this experience, we anticipate a minimal number of lawsuits to arise under S.1256.

In summary, speaking as an independent office machine dealer and as an officer of the National Office Machine Dealers Association, I wholeheartedly support S.1256 in the version ordered to be reported by the Senate Commerce Committee last December and urge that it be approved by Congress. I would like to bring to the Committee's attention that a number of allied associations (Exhibits D-I) support S.1256, including:

1. Office Products Dealer Association
2. Copier Dealers Association
3. Independent Computer Dealers of America, Inc.
4. Data Terminal Systems Dealers Association
5. Accounting-Machine Minicomputer Dealers Association
6. Association of Cincinnati Time Equipment Distributors

On behalf of all of us, enactment of the bill would, once and for all:

--Establish a standard of good faith to govern manufacturer treatment of dealers so as to eliminate threats, intimidation, coercion and other unconscionable actions aimed towards dealers by manufacturers;

--Help dealers bargain more equally with their giant manufacturers in the negotiation of reasonable sales quotas and other terms in dealer-supplier contracts;

--Make it possible for dealers to be reasonably compensated for the goodwill they generate for a manufacturer, in cases of termination or non-renewal;

--Allow dealers to reap the benefits of a market area in which they have invested their time and money, while not unfairly preventing manufacturers from further penetrating growing markets.

As a result, manufacturers will be able to market highly reliable products to increased numbers of satisfied customers, and dealers will be able to profit from their efforts as intermediaries, building an asset in their businesses and strengthening this country's small business community.

I would be happy to answer any questions that you may have.

Exhibit A

NOMDA SAMPLE
DEALER SALES AGREEMENT

THIS AGREEMENT, made this ______________ day of ______________________, 198_____, by and between

______________________________ *(Manufacturer's Name)*, a ______________ *(State)* corporation having a principal place of

business at ______________________ *(Street)*, ______________ *(City)*, ______________ *(State, Zip Code)*,

(hereinafter called "Manufacturer"), and ______________________________ *(Dealer)*, a(n) (individual) (partnership)

or (corporation organized under the laws of the State of ______________), doing business as ______________,

______________________ with a principal place of business at ______________________ *(Street)*,

______________ *(City)*, ______________ *(State, Zip Code)*, (hereinafter called "Dealer").

WITNESSETH:

In consideration of the mutual covenants herein contained, IT IS AGREED as follows:

(1) The purpose of this Agreement is to promote the development of the market for the Manufacturer's products and the long-term good will of the Dealer through the Manufacturer's sale to the Dealer of reliable products to be sold, installed, and serviced by the Dealer to the satisfaction of the end user.

(2) The Manufacturer and Dealer agree that throughout the term of this Agreement they will act in a fair, equitable, and ethical manner to each other as well as to the end user.

(3) The Manufacturer and Dealer agree that the proper servicing and installation of the Manufacturer's products is most important to the promotion and development of the market for the Manufacturer's products and the long-term good will of the Dealer.

(4) This Agreement applies to Manufacturer's full line of ______________________________ *(Product Line)* products which may be expanded from time to time by the Manufacturer who shall, upon introduction of a new product within this product line, immediately offer same to Dealer for sale and service.

(5) Manufacturer hereby appoints the Dealer as an authorized retail dealer of Manufacturer's products from the authorized sale and service locations of:

______________________ *(Street)*, ______________ *(City)*, ______________ *(State, Zip Code)*;

______________________ *(Street)*, ______________ *(City)*, ______________ *(State, Zip Code)*.

within the geographic area of primary responsibility of:

wherein Dealer is capable of servicing and installing Manufacturer's products.

(6) Manufacturer shall sell and Dealer shall purchase Manufacturer's products and parts therefor as set forth in Paragraph (4) hereof at the current published dealer price minus applicable discounts at the time of placing order. Manufacturer further agrees that for twelve (12) months after the termination of this Agreement it will continue to sell Dealer parts, schematics, and reference manuals at the then current dealer prices.

(7) Manufacturer and Dealer shall mutually establish fair and equitable standards of performance. Such standards shall reflect the actual manufacture and sales of Manufacturer's products, the potential of the area, the special circumstances of the Dealer and other office machine dealers in its market area. Manufacturer and Dealer may mutually revise such standards annually as conditions may require. Manufacturer and Dealer represent that Schedule A attached hereto and made a part hereof is in accord with the standards of this paragraph.

(8) Manufacturer and Dealer agree that the Dealer's ability to properly service and install Manufacturer's products is a primary basis for the entry of this Agreement. Dealer shall maintain adequate sales and service facilities, maintain adequate inventories and insure that his employees receive proper sales, service and installation training.

(9) The Dealer shall act in a fair, equitable and ethical manner. Manufacturer shall act in a non-discriminatory, fair, equitable, and ethical manner during the course of this Agreement and in terminating this Agreement. In any review by an Appeal Board pursuant to Paragraphs (15), (16) and (17) hereof and in any legal proceeding affecting this Agreement and the relationship established by it, the burden of proof shall be upon the Manufacturer.

(10) Manufacturer shall give the Dealer ____________ days prior notice of any price change and shall reimburse the Dealer for the amount of price reductions for those products in inventory within ________________ days of the effective date of such reduction.

(11) To protect the end user and promote good will, the Manufacturer will provide a warranty in conjunction with the sale of products to the Dealer. In the event that a Dealer sells any product for use outside the area where Dealer can adequately provide installation and warranty service, Dealer shall immediately make appropriate arrangements to have such installation and warranty service provided by another authorized dealer. Dealer shall pay such other dealer an allowance for installation and warranty service of ________________ percent (________%) of the then current suggested retail price of the product sold. This allowance is designed to give the recipient dealer reasonable compensation for installation and warranty service to be performed, and acknowledges the importance of service and installation to the end user in conjunction with every sale. Dealer agrees to provide installation and warranty service for products sold by others for use within its territory, subject to Dealer's receipt of the appropriate allowance herein provided. Said allowance may be revised by Manufacturer from time to time as circumstances dictate.

(12) This Agreement does not have any expiration date. However, Manufacturer may terminate this Agreement by written notice to the Dealer by registered mail, return receipt requested, effective ninety (90) days from the receipt of the notice if the Dealer fails to substantially comply with the provisions of this Agreement. For purposes of this paragraph ''substantially comply'' shall mean a good faith effort to comply with the Agreement provisions.

(13) Manufacturer may also terminate this Agreement by written notice to the Dealer by registered mail, return receipt requested, effective ten (10) days from receipt of the notice if the Dealer becomes seriously delinquent in the payment of any undisputed account, becomes insolvent, makes an assignment for the benefit of creditors, or files or has filed against it a valid petition in bankruptcy. For purposes of this paragraph ''seriously delinquent'' shall mean one hundred eighty (180) days or more.

(14) The Dealer may terminate this Agreement by giving Manufacturer ____________________ days written notice.

(15) The Dealer may request a review of a notice of termination by an Appeal Board, by addressing such request in writing by registered mail, return receipt requested, to the Manufacturer and to the National Office Machine Dealers Association, 1510 Jarvis Avenue, Elk Grove Village, Illinois 60007, within thirty (30) days of the receipt by the Dealer of any notice pursuant to Paragraphs (12) and (13).

(16) The Appeal Board shall be composed of one member appointed by Manufacturer and another member appointed by the National Office Machine Dealers Association, neither of which shall be an attorney at law. If the two members are unable to reach a decision on the propriety of the termination action, a third member shall be selected jointly by the first two members. If the first two members are unable to agree upon a third member, then the third member shall be selected by the Chicago branch of the American Arbitration Association, at the request of either of the two members. Notice of the hearing is to be given to the parties hereto in writing by registered mail, return receipt requested, addressed to said parties at the addresses herein set forth.

(17) (a) If the Appeal Board finds in writing that the termination was in accord with this Agreement, the termination shall become effective as of the original effective date of termination and the Dealer shall pay the fees and expenses of the Appeal Board;

(b) If the Appeal Board finds in writing that the termination was not in accord with this Agreement, then Manufacturer shall pay the fees and expenses of the Appeal Board;

(c) During the pendency of any Appeal Board hearing between the parties hereto, Manufacturer agrees not to appoint another dealer within Dealer's geographical area of responsibility, or to interrupt the delivery of Manufacturer's product to Dealer.

(18) In the event of termination of this Agreement, Manufacturer shall repurchase at Dealer's option all inventory of Manufacturer's products and parts at the prevailing published wholesale prices at time of termination.

(19) This Agreement constitutes the entire agreement, and supersedes and cancels all previous agreements.

(20) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns. Any transfer by the Dealer must be approved in writing by the Manufacturer; however, such approval shall not be unreasonably withheld by the Manufacturer.

(21) The Manufacturer's name and trademark are registered in the United States. No Dealer shall have the right to use this name and trademark without the written consent of Manufacturer. In the event of termination of this Agreement, Manufacturer has the right to withdraw this consent.

(22) This Agreement shall be governed by the laws of the State of ______________________________ (Name of State); wherever possible each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall not invalidate the remaining provisions of this Agreement.

DEALER:

____

By: ______________________________

Title: ______________________________

Date: ______________________________

MANUFACTURER:

____

By: ______________________________

Title: ______________________________

Date: ______________________________

Exhibit B

Savin

Savin Corporation

Valhalla
New York 10595
914/769 9500
Cable. Savinlet, NY

May 17, 1979

To: 700 Series Dealers:

We are pleased to announce and enclose the original and one copy of your Savin 700 Series Dealer Agreement for each of your authorized locations. The agreement is the result of our extensive research and study into every aspect of the supplier-dealer relationship to develop a fair and competitive agreement. We are satisfied now that as a consequence of this exhaustive analysis, we have produced an agreement that is equitable and in our dealers' long term best interests.

With the number of dealers we have, it would be impossible to develop a special contract for each dealer; therefore, the enclosed is the standard agreement being issued to the Savin 700 Series dealers and cannot be modified. As you will note, the effective date after execution is as of May 17, 1979. After you have reviewed the enclosures, please sign the original and each copy for each authorized location and return them, using the enclosed envelope, to me in Valhalla, New York, for execution on behalf of Savin. We will return a signed agreement to you for your files.

Because of the legalities involved, a time limit is necessary. Please return all the enclosed agreements, unmodified and properly signed, no later than June 22, 1979; otherwise we will not be able to process your orders for Savin 700 Series Products.

Savin appreciates the efforts you have extended to promote Savin Products, and we look forward to a relationship which will be mutually beneficial and profitable. You may be assured that we will continue to provide the support programs and services best suited to enhance your marketing efforts for Savin copiers.

If you have any questions, please contact your Area Manager.

Roderick D. Marcoux

Roderick D. Marcoux
Vice President/Dealer Operations

RDM/cv
Enclosures

Exhibit C

savin

SAVIN CORPORATION
DEALER AGREEMENT
700 Series Copiers

AGREEMENT made as of May 17, 1979, between Savin Corporation ("Savin") and ABC OFFICE EQUIPMENT COMPANY INC. ("Dealer").

A. Savin distributes throughout the United States a line of plain paper copiers which enjoy widespread customer acceptance and a well-earned reputation for reliability and service.

B. Dealer desires to sell at retail the line of plain paper copiers and related products described in this Agreement and to render service to such equipment in a manner which will promote customer acceptance and enhance the reputation of Savin and such equipment and to benefit Savin and Dealer.

NOW, THEREFORE, in consideration of the mutual covenants in this Agreement, Savin and Dealer agree as follows:

1. **Statement of Purpose.** The purpose of this Agreement is to promote and achieve the effective sale, rental and lease ("sale") and servicing of Savin Model 750, 755, 760, 770, 780 and 790 plain paper copiers ("Copiers") and supplies, accessories and parts sold by Savin ("Supplies") for Copiers at retail by Dealer in Dealer's assigned area of primary responsibility. Copiers and Supplies are collectively referred to in this Agreement as "Products".

2. **Appointment.** Dealer is hereby appointed by Savin as a non-exclusive dealer of Products for the area of primary responsibility described on the signature page of this Agreement ("Territory"). Dealer accepts such appointment and agrees to perform to the reasonable satisfaction of Savin the duties, obligations and responsibilities provided for in this Agreement. This Agreement does not apply to or authorize Dealer to sell or service Savin electrostatic copiers, word processors, 800 System copiers and related supplies and accessories, or any other copier or other product marketed by Savin now or in the future.

3. **Operating Standards.**

(a) **Sales.** Dealer will use its best efforts to develop diligently the retail sale of Products to their full potential in the Territory, will develop and maintain the potential for such sales, and will obtain a reasonable share of them. Whether or not Dealer has performed in accordance with this sub-paragraph (a) will be determined by reference to such reasonable criteria, including sales quotas and market studies, as are developed periodically by Savin and communicated to Dealer. Dealer will sell Products only from its authorized sales and service location and only to bona fide retail end users.

(b) **Authorized Sales and Service Location.** In order to provide Product presentation commensurate with the goodwill attached to the name Savin, and to provide prompt and effective service, Dealer will adequately equip, decorate and furnish its authorized sales and service location for the display, sale and service of Products, and maintain and staff that location with experienced, trained and competent personnel in all departments during normal business hours. The authorized sales and service location from which Dealer may sell and service Products under this Agreement is stated on the signature page of this Agreement. Dealer will not move to a new or different location or establish in any other place, within or without the Territory, a branch sales or service office, agency or other business office or operation for the sale or service of Products without the prior written approval of a Vice President of Savin. No officer, employee or representative of Savin has the right to give verbal approval to the establishment of a new or different authorized sales or service location, and any purported approval not in accordance with this sub-paragraph (b) is without legal effect.

(c) **Ownership and Management Participation.** In order to induce Savin to enter into this Agreement, Dealer represents that its present owners and management will continue in the ownership of Dealer and the operation of the authorized sale and service location designated in this Agreement.

(d) **Capital.** Savin, in consultation with Dealer, will determine from time to time the reasonable net working capital deemed necessary for Dealer successfully to carry out its obligations under this Agreement. At no time will Dealer allow the amount of this not working capital to fall below the amount shown on its current financial statements or the amount set by Savin in accordance with this sub-paragraph (d).

(e) **Inventory of Products.** Dealer will maintain inventories of Products and tools as required for effective sales and first-quality service and for purposes of demonstration and training.

(f) **Warranty**

(i) **Customers.** The sole warranties to retail purchasers of Products shall be the standard express Savin copier and drum warranties issued with Copiers and drums respectively. The express warranties exclude all implied warranties, including those of merchantability and fitness for a particular purpose, and all other liabilities, conditions or obligations of Savin. Dealer shall install all Copiers sold by Dealer and deliver and explain the provisions of the standard express warranties to each customer of Dealer at or prior to the time of installation. Dealer shall make no warranty, promise or representation with respect to Products other than those set forth in the Savin express warranties and information bulletins and circulars issued by Savin from time to time. Dealer will discharge the obligations of Savin under such warranties and will perform warranty service and provide replacement parts under warranty at no cost to customers and in accordance with policies and procedures periodically issued by Savin for all customers requesting such service in the Territory. For such service, Savin will credit Dealer's parts account in accordance with then existing warranty policies and procedures.

(ii) **Dealer.** The sole warranty issued by Savin to Dealer shall be that enunciated by Savin from time to time and communicated to Dealer. In exchange for the warranty issued by Savin to Dealer, Dealer hereby releases Savin of any and all claims with respect to the performance of Products.

(iii) **Verification of Claims.** Savin shall have the right to inspect Dealer's books and records during normal business hours relating to all claims made by customers or Dealer under the Savin warranties.

(g) **Service.** Dealer acknowledges the importance of prompt, effective and courteous service at fair rates and undertakes to render such service to all of its customers and in accordance with operating standards and guidelines established from time to time by Savin. To this end, Dealer will organize and maintain a service department and employ a sufficient number of service personnel trained to install and service all Copiers sold by Dealer, and Copiers sold by Savin or others to customers in Dealer's Territory. To insure that customers receive effective service, Dealer shall cause its service personnel to attend, in accordance with Savin programs, service training courses offered by Savin, and Dealer will furnish to such employees Savin training and service manuals and bulletins. Dealer shall expeditiously investigate and courteously handle all customer complaints.

(h) **Reports and Records.** Dealer will furnish, when requested by the Company, a complete statement of Dealer's business, operations and financial condition, including certified (or verified) copies of Dealer's then current balance sheet and profit and loss statement. In order to assist Savin in determining the potential of the Territory and Dealer's performance under this Agreement, Dealer will, upon request, provide Savin with and allow representatives of Savin to review Dealer records of sales and service certified as correct by the management of Dealer.

(i) **Observance of Laws, Rules and Policies.** Dealer will abide by, and insure that its officers and employees abide by, all federal, state and local laws and ordinances, and all rules, regulations and policies issued by Savin from time to time with respect to the sale, servicing and promotion of Products and the conduct and operation of Dealer's business.

4. **Orders.** Dealer will submit orders for Products in accordance with policies and procedures established by Savin from time to time. Savin reserves the right to allocate its inventory of Products in its sole and absolute discretion. All orders are subject to approval and acceptance by Savin. Savin shall not be liable to Dealer or any other party by reason of the failure of Savin to make delivery of Products against any accepted order on account of:

(a) wars, acts of God, governmental action or order, labor difficulties, difficulty in procuring materials, labor or transportation, or any other similar causes;

(b) receipt of orders from all sources for quantities of Products in excess of the capacity of Savin to manufacture or procure, under then operating schedules and conditions; and

Needs
[illegible]

(c) other causes beyond the control of Savin.

5. **Prices.** Savin will notify Dealer from time to time of the prices, charges and terms and conditions of purchase of Products, and will invoice Dealer for Products at dealer prices in effect at the time of shipment.

6. **Title to Products and Risk of Loss.** Title to Products shall remain in Savin, and Savin will have a security interest under the Uniform Commercial Code in such Products, and the proceeds thereof, until Savin shall have been paid in full. Dealer will execute, and Savin is hereby authorized as attorney-in-fact to execute and deliver on behalf of Dealer, any and all financing statements and other instruments which Savin may deem necessary and desirable to protect such security interest. Notwithstanding the retention of title to Products in Savin, Dealer shall bear all risk of loss to Products upon delivery to Dealer f.o.b. Savin warehouse loading dock.

7. **Payment for Products.** Dealer shall make payment of all invoices for Products to Savin at its New York Office, and in accordance with periodic instructions of Savin, without offset, counterclaim or deduction of any kind, within thirty (30) days of the date of invoice. Dealer shall comply with published credit and collection policies of Savin. If the terms of sale and payment for any order are not fulfilled, Savin may decline to make further deliveries except upon receipt of cash or satisfactory security.

8. **Direct Sales by Savin.** Dealer recognizes that in order for Savin and Dealer to market Products successfully, it is desirable for Savin to offer Products to customers under its Major Account Marketing and Government Education and Medical plans, and other similar plans which may be developed from time to time. Dealer acknowledges that Savin may sell directly Products, either through its national offices or through its branches, to any person, firm or corporation within or without the Territory, at prices which may vary from those at which Savin sells to Dealer and other dealers. Dealer agrees, when authorized in writing by a Vice President of Savin, to render assistance to and cooperate with Savin in the marketing of Products in accordance with such plans. In the event of sales or rentals by Savin under such plans, Dealer may receive or be allowed such commission, if any, as Savin in its discretion may deem appropriate, taking into account the circumstances of such sale, including the places of demonstration, installment, sale, and prior contact by Dealer with the customer.

9. **Term.** This Agreement shall become effective upon execution by a Vice President of Savin as of the date stated on Page 1, and shall continue in effect until December 31, 1980, unless either Savin or Dealer shall have terminated this Agreement under Paragraph 10.

10. **Termination.**

(a) Dealer or Savin may terminate this Agreement without cause by giving written notice specifying the date of termination, which date shall not be less than 30 days, or such longer period as may be required by law, subsequent to the date of notice.

(b) Savin may terminate this Agreement by giving written notice to Dealer specifying the date of termination in the following circumstances:

(i) breach by Dealer of a material term or condition of this Agreement;

(ii) any material misrepresentation by Dealer as to the ownership, management or business operations of Dealer;

(iii) the liquidation, dissolution, merger, consolidation or change of management or ownership of voting stock of Dealer;

(iv) the bankruptcy or insolvency (no matter how evidenced, including the repeated failure to pay invoices for Products when due) of Dealer;

(v) the issuance by Savin of a new form of dealer agreement; or

(vi) the discontinuance by Savin of its present method of distributing Produc..

11. **Extension of Term.** Savin may extend the term of this Agreement by giving written notice of such extension at any time prior to termination.

12. **Effect of Termination.**

(a) Upon the termination of this Agreement for any reason:

(i) Dealer shall not engage in any activity which might imply or represent that it is an authorized Savin dealer, and shall, at its sole expense, take all steps necessary to remove any listing in any telephone directory or other publication that it is an authorized Savin dealer;

(ii) Dealer shall assign to Savin or to its nominees all orders for Products and deposits received from customers, and all orders by Dealer for ~~Products shall be cancelled~~, if Savin so elects;

(iii) Dealer shall, at its sole expense, discontinue the use of Savin trademarks, trade names, labels and copyrights and materials and signs bearing the name Savin or any other trademark or trade name of Savin, and will remove such names and trademarks from letterheads, stationery and other forms used by Dealer;

(iv) Dealer shall, at its sole expense except if Dealer shall have paid for them, immediately return to Savin all parts books, service manuals, and signs or advertising materials illustrating Products or bearing the name Savin and all similar materials supplied by Savin;

(v) The acceptance of any order from or the sale of any [illegible] be construed as a renewal or extension, nor as a waiver of termination;

(vi) Termination shall be without prejudice to the rights of either party to moneys due or to become due under this Agreement"

(vii) Dealer acknowledges that its breach of the obligations of this Paragraph 12 and Paragraph 13 will cause Savin irreparable injury, and consents to the issuance of preliminary and final injunctive relief to obtain or enforce Dealer's compliance; and

(viii) Dealer will be liable and will reimburse Savin for all costs incurred, including the maximum attorneys fees recoverable, in any action brought by Savin to recover moneys due under this Agreement or to obtain Dealer's compliance with this Agreement.

(b) Upon termination of this Agreement by Savin, Savin shall repurchase from Dealer, upon written request made by Dealer within 30 days of termination:

(i) All new, unused and undamaged Products purchased by Dealer from Savin at the invoice price paid by Dealer for those Products; and

(ii) All special tools and equipment in usable and good condition purchased by Dealer from Savin during the term of this Agreement at a price to be mutually agreed upon by Dealer and Savin.

13. **Trademarks.**

(a) Dealer acknowledges that Savin has the exclusive ownership rights in and to use the Savin trademarks, service marks and trade name in connection with the sale and service of Products and supplies, and agrees it shall never contest such rights.

(b) Dealer is hereby granted a non-exclusive right and license to use Savin trademarks and service marks in connection with the sale and service of Products under this Dealer Agreement. The term of such right and license shall terminate upon the termination of this Agreement.

(c) Dealer shall sell Products only under Savin trademarks, in accordance with instructions as shall have been issued from time to time by Savin. Dealer shall not remove trademarks or serial numbers from or alter any of the Products or engage in any other activity which will in any way tend to impair the reputation of Savin. Dealer will not use or adopt any name, trade name, trading style or commercial designation used by Savin, or use the word ~~Savin in~~ Dealer's trade or corporate name.

(d) Dealer agrees to discontinue immediately, at its sole cost and expense, any use of Savin trademarks and service marks which, in the sole judgment of Savin, is inconsistent with the reputation and standing of Savin, or with the business, advertising or public relations policies of Savin, or is misleading or confusing as to the rights or status of Dealer under this Agreement.

14. **Products of other Suppliers.** Dealer understands that it is the policy of Savin that Dealer is not required to refrain from purchasing copiers and duplicators, and related parts and supplies, of other suppliers as a condition of being permitted to purchase Products. Dealer agrees to notify Savin in the event Dealer enters into an agree[illegible] to sell or service copiers or duplicators and related parts and supplies of other suppliers.

15. **Dealer Not An Agent.** The relationship provided for in this Agreement is that of seller and buyer, and neither Dealer nor the employees of Dealer shall be considered employees or agents of Savin for any purpose whatsoever. Dealer is not granted any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of Savin or to make any representation of any kind in behalf of Savin, except for the warranties of Savin with respect to Copiers and drums.

16. **Assignment.** Neither this Agreement nor any interest in this Agreement may be assigned, subdivided, or transferred by operation of law or otherwise by Dealer. Any purported assignment by Dealer in violation of this Paragraph is void. Notwithstanding the foregoing, Savin may assign its interest, rights and obligations under this Agreement to any firm or corporation, but such assignment shall not relieve Savin from its obligation to pay Dealer any sums of money due or to become due to Dealer prior to the effective date of such assignment.

17. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

18. **Severability.** If any term or provision of this Agreement shall to any extent be found to be invalid, void or unenforceable, the remaining terms and provisions shall nevertheless continue in full force and effect.

Exhibit D

Office Products Dealer Association

OFFICERS

Chairman of the Board
WILLIAM C. MATTHEWS
Memphis, Tennessee

President
WM. H. FISH
Atlanta, Georgia

Executive Vice Presidents
THOMAS A. RUSSO
Wilmington, Delaware

ROBERT S. STARR
Minneapolis, Minnesota

Vice President
J. L. ERWIN
Dallas, Texas

Treasurer
CLYDE SMITH
Shreveport, Louisiana

REGIONAL MANAGERS
JIM VANCE
JOHN HASTINGS
JERRY METZGER
JIM ERWIN
TONY ST. JOHN

DIRECTORS
BILL MATTHEWS
BILL FISH
TOM RUSSO
BOB STARR
JIM ERWIN
CLYDE SMITH
JIM VANCE
JOHN HASTINGS
JERRY METZGER
TONY ST. JOHN
CLINT HOVIS
AL DEATHE

FINANCIAL SECRETARY
SHEILA M. CROUCHLEY, CPS
P.O. Box 181178
Memphis, TN 38116

EXECUTIVE DIRECTOR
PHIL PEPE
P.O. Box [illegible]
Blue Bell, PA 19422

April 2, 1982

Mr. John Kuchta
126 N. 14th Street
Lincoln, Nebraska 68508

Dear Mr. Kuchta :

The Office Products Dealer Association supports The Retail Dealer's Agreement Act, Senate Bill S.1256 one hundred percent.

The Executive Committee has authorized me to speak for our total membership of approximately one hundred dealers. We stand ready to help in any way that we can.

Sincerely,

William H. Fish

William H. Fish
President

19 **Entire Agreement.** This Agreement supersedes and terminates any and all prior agreements, oral or written, between Savin and Dealer with respect to the sale and servicing of Products. Dealer agrees that it has not relied on any representations, warranties or promises not explicitly stated in this Agreement, that no oral statement has been made to it that in any way tends to modify or waive any of the terms and conditions of this Agreement, and that this Agreement is the entire arrangement between Savin and Dealer with respect to the sale and servicing of Products. No part of this Agreement, which is personal in nature, may be modified or supplemented except by a written instrument signed by a Vice President of Savin and by an officer of Dealer. In the event of interpretation of, or dispute under this Agreement, or term or any provision of this Agreement, any course of dealing or trade usage or custom, or course of performance shall not be relied on or referred to by Savin or Dealer to contradict, explain or supplement any provision of this Agreement, it being acknowledged by Savin and Dealer that this Agreement is intended to be, and is, the complete and exclusive statement of the Agreement with respect to its subject matter.

Authorized Sales Location: N. 2928 Nevada Street, P.O. Box 2763, Spokane, Washington 99220

Territory: (State of Washington, Counties of Adams, Douglas, Ferry, Grant, Lincoln, Okanogan, Pend Oreillie, Stevens, Spokane, Whitman)

NAME OF DEALER: ABC Office Equipment Company Incorporated

TYPE OF ENTITY:
(Corporation, Partnership,
Sole-Proprietorship) ____________________

STATE OF AUTHORIZATION: ____________________

AUTHORIZED SIGNATURE
AND TITLE: ____________________

ACCEPTANCE BY
SAVIN CORPORATION
At Valhalla, New York: ____________________
Vice President

Exhibit E

COPIER DEALERS ASSOCIATION

P. O. Box 610
Enfield CT 06082

Send to vendor + own

TO: ALL CDA MEMBERS

FROM: ELLIOT BLOOM

DATE: APRIL, 1982

RE: RETAIL DEALERS AGREEMENT ACT

This is the proposed letter we plan to send to Senator Strom Thurmond, Chairman of the Judiciary Committee.

Please let us know of your comments.

No membership list

We are writing to you regarding the Retail Dealers Agreement Act, Senate Bill No. 1256. Our Association is the country's largest organization of office copier dealers, and as the enclosed membership list will attest, is a membership which represents most of the states in the Union.

At our March 19th meeting in California, the membership studied the details of Senate Bill No. 1256 and unanimously agreed to join with the National Office Machine Dealers Association in supporting the bill which is before your judiciary committee and urging you to take the required actions to bring this bill to a full Senate vote.

We understand that objections to the bill include the fact that it could interfere with contractual relationships and limit free competition. However, it is our understanding that the bill will not interfere with contractual relationships, but merely give the dealers the right to enforce contractual agreements and to have a means to redress unfair treatment which can occur within a contractual relationship. We also feel that the bill will not limit competition, it will only give the dealers an opportunity to have a court of law determine when a dealer has been unfairly treated and defrauded out of his livelihood.

We thank you for your time and hope that you can bring your immense influence to bear to have this bill approved in committee and sent on its way to enactment and to law.

Sincerely,

/kam

Exhibit F

INDEPENDENT COMPUTER DEALERS OF AMERICA
ICDA, INC.
c/o ACCOUNTING EQUIPMENT CORPORATION 5815 N. BLACK CANYON HWY. PHOENIX, AZ 85015
PHONE: (602) 242-9440

May 14, 1982

Mr. Paul McWilliams, Chairman
Nomda Affiliations Committee
1915 Shadowlane
Little Rock, Arkansas 72207

Dear Mr. McWilliams:

I have polled the officers of our Association and all are in agreement that I should send to you the following statement regarding the legislation now pending in Congress.

The Officers of the Independent Computer Dealers of America support and ask for a yes vote on S.1256/HR.4009, the RETAIL DEALERS AGREEMENT ACT.

I wish you the best of luck.

Sincerely,

Gloria Wills, Secretary
Independent Computer Dealers of America

cc: All members of ICDA

Officers:

Edward R. Goff, President
Accounting Equipment Corp.
5815 N. Black Canyon
Phoenix, AZ 85015

Anthony Vitale, Vice President
Pro Systems, Inc.
63 Sockanossett Road
Cranston, R.I. 02920

Gloria Wills, Secretary
Accounting Equipment Corporation
5815 N. Black Canyon
Phoenix, AZ 85015

John Mulcahy, Treasurer
YBM Corporation
1505 Logan Ave.
Youngstown, OH 44505

Exhibit G

DATA TERMINAL SYSTEMS DEALERS ASSOCIATION
Suite 309 • 2020 Algonquin Road • Schaumburg, IL 60195 • (312) 397-3113
DTSDA

April 13, 1982

Mr. Paul McWilliams, Chairman
NOMDA Affiliations Committee
1915 Shadowlane
Little Rock AR 72207

Dear Paul:

The officers of our Association support and ask for a 'Yes' vote on S.1256/HR.4009, the Retail Dealers Agreement Act.

Sincerely,

DTSDA

John Lockington
Executive Director

/jh

Exhibit H

ACCOUNTING-MACHINE MINICOMPUTER DEALERS ASSOCIATION
of America, Inc.

ACCOUNTING-MACHINE MINICOMPUTER DEALERS ASSOCIATION
amda

PRESIDENT
R. W. (BOB) [illegible]
DATASCOPE OF CANADA LTD
1 BRIMLEY ROAD
SCARBOROUGH, ONTARIO M1J 1A2
416 284 3221

FIRST VICE PRESIDENT
L. G. (LARRY) FINCH
SHASTA GENERAL SYSTEMS, INC
1319 MOFFETT PARK DR
SUNNYVALE CA 94086
408 734 [illegible]

SECOND VICE PRESIDENT
DONALD B. MULVEY
COMPUTER SERVICES ASSOCIATES
P. O. BOX 13172
OAKLAND CA 94661
415 763 2500

EXECUTIVE SECRETARY
W. T. (BILL) EWELL
P. O. BOX 627
FORT WORTH TX 76101
AMDA HOT LINE 817 531 1371

TREASURER
LEWIS LOVE
THE SPECIALTY SERVICE CO
6303 E LANCASTER (BOX 4017)
FORT WORTH TX 76101
[illegible]

HONORARY BOARD CHAIRMAN
CHAIRMAN, MEMBERSHIP COMMITTEE
ED MANCINI
EDWARD MANCINI INC
1251 W MADISON ST
CHICAGO IL 60607
312 [illegible] 5995

BOARD CHAIRMAN
KEN WILSON
WILSON BUSINESS MACHINES INC
[illegible] COURT
[illegible]
315 478 [illegible]

May 17, 1982

National Office Machine Dealers Association
1510 Jarvis Ave.
Elk Grove, IL 60007

Gentlemen:

The officers and directors of this Association, individually, have voted to endorse your sponsorship of the RETAIL DEALERS AGREEMENT ACT (Senate Bill 1256 & House of Representatives Bill 4009).

The seven officers and nine directors polled by telephone were unanimous in their approval for AMDA to go on record officially in support of this pending legislation.

Yours very truly

W. T. Ewell

W. T. Ewell
Executive Secretary

PREPARED STATEMENT OF STEPHEN PHILLIPS

Good morning. My name is Stephen D. Phillips. I am president, owner and operator of a small office machine dealership in Birmingham, Alabama. I was honorably discharged from the Air Force in 1969, and first worked for Burroughs for two years. I had learned how to service office equipment while in the service and decided to use the skills I had acquired there to sell and service such machines when I got out. I began P & S Business Machines in 1969.

The story I have to present before this Committee today is one of a small businessman who after achieving considerable success by effectively promoting the name and products of his supplier, suddenly found his business as well as his future virtually destroyed by the abusive, grossly unfair tactics of that same supplier. Moreover, my attempts at using our court system to remedy the injustices I have suffered have failed. My business is close to bankruptcy because of the enormous financial losses resulting from the unfair behavior of this manufacturer. As you can imagine, there are also sizable costs in fighting a legal battle against such a giant company.

My association, the National Office Machine Dealers Association, and I strongly believe that so long as a dealer pays his bills, meets reasonable and fair quotas, services equipment in the field, promotes the manufacturer's name and goodwill and treats the manufacturer in a fair and equitable manner, the manufacturer has an obligation to treat the dealer fairly and equitably in return. This includes maintaining the integrity of the dealer's territory by not arbitrarily saturating a market area with new dealers. In my case, my supplier not only violated this principle, but also broke promises made to me over a period of years.

Let me now take a few minutes to describe my situation to the members of this Committee. In the late 1960's, like any other small dealership starting out, I took on a number of lines of office equipment and sold a variety of products. I had no exclusive lines; I sold only open-line products selling what I could get. Gradually, through hard work and careful attention to my growing customer base, I built a good reputation for quality service, and I developed excellent relationships with both commercial and government end-users.

By early 1975, I felt that I had progressed sufficiently to be able to take on an exclusive line. Consequently, I attended the annual Southeast Region Office Machine Dealers Association trade show and exhibition with the intention of visiting a number of manufacturers regarding an exclusive or franchise product line. At that time Olympia, a German office equipment manufacturer specializing in typewriters and calculators, had only one dealer in Birmingham. I decided to initiate discussions with the appropriate representatives of this company. One of its sales representatives named Bob Morris told me that Olympia currently had a one-man dealership in the area, but he was not performing. If P&S did a good job and built the Olympia name, Olympia would cancel this other dealer, thus leaving P&S with a truly exclusive territory. Furthermore, I agreed with Mr. Morris not to take on any competitive lines which might be offered by such companies as Olivetti, Remington, Adler-Royal and so on. In fact, I dropped the SCM and Victor lines that I had been selling and servicing.

On March 6, 1975, I gladly signed a contract with Olympia which I thought would guarantee me fair and equitable treatment by the supplier (Exhibit A). Not long afterwards the only other active Olympia dealer in the area was cancelled.

Over a period of six years, I worked strenuously to build the Olympia name in the Birmingham area. We constantly advertised Olympia's name--on our business cards, our letterhead, billboards, radio, TV, and newspapers. We committed ourselves to building Olympia, not P&S Business Machines. The fact of the matter is that in 1975, Olympia was an off-brand in Birmingham. Building a reputable name for Olympia was an uphill battle every bit of the way. Total Olympia sales in the Birmingham area in 1975 did not exceed $5,000 wholesale. By 1981, I had a turnover of $130,000 wholesale, a 2600 percent increase in sales in just six years. I estimate that normal growth in my market area would have yielded annual sales of $2 million in ten more years. I did so well in marketing Olympia's products that I was rewarded with three separate overseas trips to Asia, Scandinavia, and the Caribbean. I never really had a quota to meet for Olympia. While my contract did have a quota, I was told that this didn't make any difference. So long as I did a good job and didn't carry any other lines I was guaranteed my exclusive territory of Jefferson County.

As a result of my evident success with the Olympia line in Birmingham, Olympia's sales representative for my territory, Bob Morris, and I became friends. We vacationed together; we jointly attended many social occasions; and he developed friendships with the employees of P&S. Normally office machine dealers, like other retailers in highly competitive industries like ours, keep their customer lists and employees at arm's length from their suppliers for the sake of protecting these valuable assets. In my case, Morris told me not to worry because Olympia had a rule and a policy that it would not set up a dealer's employee as another dealer, whether in the same market area or not, without the permission of the former employer-dealer. In fact, he said he would never even approach my employees without my knowledge and consent. Morris told me that Olympia's policy was to "work for the dealer." Consequently, I allowed Morris and other Olympia personnel to work directly with my sales and service people corresponding by mail and telephone as required, as well as seeing them in person. In general, I just considered P&S to be an Olympia branch.

Most dealers have several lines of products, which I later discovered is a protective device to avoid having all their eggs in one basket. However, at the time, I believed representing more than one manufacturer was foolish as long as a good company like Olympia was backing them up, and I told other dealers so. Morris said Olympia never wanted two dealers in one area; they only wanted to build a long-term relationship with one good dealer. Moreover, he said Olympia wouldn't set up another dealer in my market area, so long as I met the conditions of doing a good job and not carrying any competitive machines. If Olympia felt I was not doing a good job, and if I felt I was performing adequately, then Olympia would agree to arbitrate the issue before a NOMDA Appeals Board or arbitration panel. He said this was Olympia's policy.

Because I had performed so well for Olympia and because I had developed an excellent reputation for quality products and service, a number of manufacturers of typewriters and calculators approached me about taking on their lines. Olivetti wanted me to take over the Olivetti business after they closed their branch operation in Birmingham. Adler-Royal, Remington-Rand, and Silver-Reed asked me to market their typewriters. Canon requested that I sell its line of calculators. I had to turn them all down because of my commitment and loyalty to Olympia. These manufacturers are now tied in with other dealers in town.

My profitable business and bright future started to come apart at the seams on January 14, 1981. I was about to leave for the Inauguration of President Reagan when I was told by my top salesman, Guy Lopresti, that he was quitting. That same day my right hand man and general manager, Don Mayo, indicated he intended to resign as well but would stay on until I had returned from Washington. He said he was not going into business with Guy Lopresti, but into the computer software services field. I offered him $40,000 guaranteed to stay, and he said we would discuss it on my return from Washington. I left, entrusting my business to Don.

Upon my return from Washington, I found that not only had I lost half of my employees, including my top salesman, my general manager, and two servicemen, but that Olympia set them up before I even returned, delivering equipment on the day the contract was signed. Olympia did all this while promising me that it would not establish a competing dealer in my market area and certainly not hire away my employees while I was doing a good job.

In the conversation with Bob Morris not long after this turn of events, I was told that Guy Lopresti had first approached Olympia the previous fall to take on the Olympia line. Morris said he eventually made the decision to set up this new company, Action Business Machines, because it had a good salesman and good servicemen already trained on all the equipment. Olympia had by then excellent name recognition which, of course, my company had built for it over the past six years.

I subsequently discovered that my November and December 1980 and January 1981 sales had been far lower than usual because Lopresti had been taking orders for equipment from our customers but not filling them so that Action Business Machines could get the business when it was operating in January. Even worse, while I was in Washington, Mayo had secretly photocopied my corporate records, including customer lists, price lists, maintenance agreements and expiration cards, everything which had made my business successful and profitable. In addition, he had gone on service calls to bring my customers to Action.

Realizing that my pleas for a reasonable explanation of Olympia's actions were being generally ignored by Morris, I called Mr. Sieb Postma, Olympia's Vice President-Marketing. Postma told me he would stop the decision to set up Action, but he did nothing.

In the face of such abusive and unfair actions, I had no choice but to sue Olympia for fraud, demanding actual and punitive damages of $8 million. At the time the suit was filed, I told Olympia my normal revolving debt to the company, which only amounted to $30,000 according to my dealer inventory plan, would not be paid but be settled in court. In the meantime, I asked Olympia to put me on a C.O.D. basis.

At this point, P&S Business Machines was still an Olympia dealer. I had over 1,000 Olympia machines in the field, and the equipment needed to be serviced on a regular basis. I had customers with machines on order and deposit checks to reserve them. I had my national account and school bid business. After the suit was filed, Olympia refused to ship me machines or parts, even on a C.O.D. basis. I had to give back customers their deposit checks for ordered equipment I couldn't get and send them elsewhere. I no longer was allowed any "ship-in" business for products sold outside Birmingham but requiring service in my market area, and I lost all my school bid accounts. Although Olympia now ships me some parts C.O.D., my customers have gradually begun to do business with other dealerships because I cannot consistently obtain the products to meet my customer's needs.

My lawsuit against Olympia resulted in a counter-suit for $30,000. After a one-week jury trial before federal district court in Alabama, the jury awarded me $3 million in damages and said I must repay Olympia the $30,000 which I owed them. The judge in the case, however, set aside the jury's verdict, yet still required me to repay my debt to Olympia. At a new trial, the judge decided after three days that Olympia's assurances to me regarding the exclusivity of my market area and dealings with my employees were only promises which do not carry weight in a court of law.

I have been hurt and cheated. I was geared toward the future, and lost much due to Olympia's lies. My business, one-third to one-half of which Action drained away as a result of Olympia's actions, lost some $75,000 last year, the first time in 13 years I have lost money. In addition, I still owe Olympia $30,000. I cannot sell a sizable inventory of shoddy equipment, parts and supplies, and I am responsible for the court costs in both trials I have just mentioned. Olympia's actions have also affected my family and employees. My employees have had to take several cuts in pay, and can get no raises. I urge the members of this Committee to move S.1256 on towards passage by the U.S. Congress. Had this bill been law when I signed my contract with Olympia in 1975, I would still be running a booming business. Olympia would not have been able to treat me so cavalierly despite my earnest efforts to build its name and reputation in the Birmingham area. Action Business Machines would not have been able to coattail on the goodwill I had generated for Olympia, reaping the profits which P&S Business Machines should have received. My future has been ruined. I lived up to all the conditions and rules set by Olympia; all I wanted was what they promised me. Let us not allow the same thing to happen to other dealers who must rely on the promises and assurances of their suppliers.

I would be happy to answer any questions that you may have.

OLYMPIA USA INC

Precision
Business Equipment

Box 22 Somerville, New Jersey 08876
Tel. (201) 722-7000/Telex 833-465

Olympia
International

March 26, 1975

P & S Business Machines, Inc.
4122 10th Avenue, North
Birmingham, AL 35212

Gentlemen:

It gives us great pleasure to forward herewith your approved copy of the new Olympia Dealer Sales Agreement.

We would like you to know that our sales and service representatives and office staff take a personal interest in your satisfaction and are ready to assist you at all times.

Please let us serve you in any manner that will add to your convenience and our mutual profitability.

Very truly yours,

Sieb J. Postma
National Sales Manager

SJP/bca

Subsidiary of Olympia Werke AG
Wilhelmshaven, F.R. Germany

Olympia Dealer Sales Agreement

SD-3483

This Agreement, made this 6th day of March, 19 75, between Olympia USA Inc ("Olympia"), Somerville, New Je

and P & S BUSINESS MACHINES, Inc. ("Deale

Street 4122 10th Ave. N. City Birmingham County Jefferson State Alabama Zip 35212

Witnesseth:

In consideration of the mutual covenants herein contained, it is agreed as follows:

1. The purpose of this Agreement is to promote the development of the market for Olympia products and the long-term goodwill of the Dealer by providing for mutuality of interest and maximum cooperation between the parties.

2. Olympia hereby appoints the Dealer as an authorized Dealer in the following geographic area:

State of Alabama; Counties of Jefferson, Shelby, St. Clair, Calhoun and Cleburn.

Dealer will use its best efforts to promote the sales and service of Olympia products within such area (but nothing contained herein shall limit the geographic area within which or the persons to whom Dealer may resell Olympia products).

3. Olympia shall sell and the Dealer shall purchase the products set forth in Schedule A attached hereto.

4. Olympia shall establish fair and equitable standards of performance. Such standards shall reflect the actual sales of Olympia products, potential of the area, and take in account the special circumstances of the Dealer and other office machine dealers in its market area. Olympia may change such standards on an annual basis or as conditions require. Olympia represents that Schedule B attached hereto is in accord with such standards. Failure of the Dealer to meet standards of performance established by Olympia pursuant to this paragraph shall constitute failure of the Dealer to substantially comply with the provisions of this Agreement for purposes of Section 12 hereof.

5. The Dealer shall devote his best efforts to develop the sales and service of Olympia products. These efforts shall include the maintenance of adequate sales and service facilities, including sales and service training and adequate inventory.

6. The Dealer shall purchase Olympia products at Dealer price and terms as established by Olympia Price Lists.

7. The Dealer shall act in a fair, equitable and ethical manner. Olympia shall act in a non-discriminatory, fair and equitable manner during the course of this Agreement and in terminating this Agreement. In the review by the Appeal Board under Section 16 and in any legal proceeding affecting this Agreement and the relationship established by it, the burden of proof shall be upon Olympia.

8. Olympia shall give the Dealer thirty days prior notice of any price reduction, or shall reimburse the Dealer for the amount of the price reduction for those products in inventory purchased within thirty days of the effective date of such reduction.

9. In the event of termination of this Agreement Olympia shall have the option to repurchase all or any part of the inventory from the Dealer. This inventory shall be repurchased at prevailing published wholesale prices at time of termination.

10. As to each state and to such sales where it is lawful to so agree (but not elsewhere or otherwise) Dealer agrees (a) that it will not (except as specifically permitted by statute) directly or indirectly advertise, offer for sale or sell product at prices less than the fair trade prices now or hereafter designated by Olympia, which prices may be amended at any time by Olympia upon notice to Dealer, exclusive of all applicable sales and use taxes; and (b) that it will not sell or transfer product to any reseller unless such reseller has agreed with Olympia to maintain Olympia's fair trade prices.

11. To promote customer goodwill and to protect the guarantee of Olympia products: (a) If the Dealer sells any product and it is used outside the sales and service area Dealer shall reimburse Olympia in accordance with the installation and warranty schedule published by Olympia, and (b) If Olympia products are sold by other Dealers into the area, Olympia shall reimburse the Dealer in accordance with the aforesaid schedule and debit the account of the Dealer who purchased the product from Olympia.

12. This Agreement does not have any expiration date. However, (a) if the Dealer fails to substantially comply with the provisions of this Agreement, Olympia may terminate this Agreement by written notice to the Dealer, effective ninety days from receipt of the notice; or (b) if the Dealer becomes seriously delinquent, insolvent, makes an assignment for the benefit of creditors, or files or has filed against it a petition in bankruptcy, Olympia may terminate this Agreement by written notice to the Dealer, effective ten days from the receipt of such notice.

13. The Dealer may terminate this Agreement by giving Olympia five days written notice.

14. The Dealer may request in writing, within thirty days of the receipt by him of a notice pursuant to Section 12, a review of the notice of termination by an Appeal Board.

15. The Appeal Board shall be composed of one member to be appointed by Olympia, another member to be appointed by the National Office Machine Dealers Association, and a third memb to be selected jointly by the first two members. If the first two members are unable to agree upor the third member within twenty days, then the third member shall be selected by the New York City branch of the American Arbitration Associat at the request of either of the first two members.

16. (a) If the Appeal Board finds in writing that the termination was not in accord with this Agreemer then Olympia shall re-instate the Dealer and pay the fees and expenses of the Appeal Board. (b) If the Appeal Board finds in writing that the termination was in accord with this Agreement, th termination shall become effective as of the original effective date of termination and the Dea shall pay the fees and expenses of the Appeal Board.

17. This Agreement constitutes the entire Agreemen and supersedes and cancels all previous Agreements.

18. This Agreement shall not be assigned by the Dealer without the express written consent of Olympia.

19. The Olympia name and trademark are registered in the United States. No Dealer shall have the right to use this name and trademark without the written consent of Olympia USA Inc. In the event of termination of this Agreement Olympia has the right to withdraw this consent.

20. This Agreement shall be governed by the laws of the State of New York.

In Witness Whereof, the parties have caused this Agreement to be executed by their duly authorized agents on the day and year first above written.

Dealer Approval:

(Type name and title of person authorized to sign)
Stephen D. Phillips Pres.
Legal signature Stephen D. Phillips

Olympia USA Inc Approval:

District Sales Manager
Signature
Regional Sales Manager
Signature
(Type name and title of officer)
Sieb J. Postma - National Sales Manager
Legal signature

Olympia USA Inc
Somerville, New Jersey 08876

Form No. 7001—6/70

Dealer Copy

Schedule A

Olympia Product Assignment

Applies to Agreement No. 3483

In accordance with the terms of Olympia Dealer Sales Agreement, dealer is authorized to sell and service the specific Olympia Products as grouped below. (Check one group only)

☒ **Product Group A** (Full Line)
- Office Electric Typewriters
- Correspondence Electric Typewriters
- Office Manual Typewriters
- School/Office Electric Typewriters
- School/Correspondence Electric Typewriters
- School/Office Manual Typewriters
- Electric Portable Typewriters
- Manual Portable Typewriters
- Consumer Adders & Calculators
- Office Adders & Calculators
- Supplies

☐ **Product Group B**
Same as *Product Group A*
minus School Machines

☐ **Product Group C** (Consumer Products)
- Electric Portable Typewriters
- Manual Portable Typewriters
- Consumer Adders & Calculators
- Supplies

☐ **Product Group D**
Same as *Product Group C*
plus Office Adders & Calculators

☐ **Product Group E**
Supplies

☐ **Product Group F**
Mini Calculators Only

This Schedule supersedes and cancels all previous Product Assignments.

Dealer Approval:

Name of Dealership
P & S BUSINESS MACHINES, Inc.

pe name and title of person authorized to sign)
Stephen D. Phillips Pres.

Legal signature
Stephen D. Phillips

Date
March 6, 1975

Olympia USA Inc Approval:

District Sales Manager
Signature

Regional Sales Manager
Signature

(Type name and title of office)
Sieb J. Postma - National Sales Manager

Legal Signature

Date MAR 26 1975

Form 7010 Rev 8/7/73

Dealer Copy

Schedule B

Olympia Standards of Performance

Applies to Agreement No. 3483

In accordance with the terms of the Olympia Dealer Sales Agreement and by mutual consent, the following fair and equitable Standards of Performance have been established for the annual period indicated. These are independent of sales to schools and hospitals.

For a One Year Period Beginning

Product	Commercial/Government Units
Office Electric Typewriters	24
Correspondence Electric Typewriters	24
Office Manual Typewriters	8
Office Adders and Calculators	
Electronic Calculators	48

Dealer Approval:

Name of Dealership
P & S BUSINESS MACHINES, Inc.

(Type name and title of officer)
Stephen D. Phillips Pres.

Legal Signature
Stephen D. Phillips

Date
March 6, 1975

Olympia USA ~~Inc~~ Approval:

District Sales Manager
Signature

Regional Sales Manager
Signature

(Type name and title of office)
Sieb J. Postma - National Sales Manager

Legal Signature

Date
MAR 26 1975

7011 Rev 11/71

Dealer Copy

PREPARED STATEMENT OF DON WILCOX

Good morning. My name is Don Wilcox and I am president of Wilcox Office Equipment in Florence, South Carolina. My father founded Wilcox Office Equipment in 1952, and for these past thirty years we have been successful and reliable suppliers of office machine products and service for our community. I carry a full line of office furniture, Olivetti electric and manual typewriters, Sharp calculators and since 1963 I have marketed copiers. In the past I have carried SCM and Saxon copiers, but for the last 6 years, I have been solely a Savin copier dealer.

Listening to the testimony given by my fellow dealers regarding the array of problems inherent in the manufacturer-dealer relationship, I can say that most dealers in our industry have had at least one of them at some time or another. Arbitrary quotas, dealers set up in so-called "exclusive" territories and field-testing of products at our and our end-users' expense are all problems I have fortunately escaped up to this point. The problems I have had with my supplier--unpaid commissions, misrepresentations, refusals to supply needed parts and supplies--have, however, also become part of the customary ways of doing business in our industry and must be suffered by the small dealer is he wishes to remain in the marketplace. In my case, the efforts I had put into developing name recognition and growth in sales for my manufacturer resulted in termination without cause. The basic attitude which underlies all our problems, and the reason we are here today before this Committee, is the outright refusal of manufacturers to treat their dealers fairly and equitably.

Allow me to relate my personal experience with this attitude. As I mentioned, I have been a Savin dealer for about six years. For the last two years, Savin copiers have been the only brand I have been marketing. In retrospect I now realize that limiting myself this way was probably the beginning of the end for my business. I have several national and state accounts. These are large accounts where I deliver and service the machines, and receive a commission from Savin. Early in 1981, I began having problems receiving the commissions due me. Even though the total amount owed me was in the neighborhood of $35,000, I still paid my bills, and I continued to meet my quota. The way I was able to do this was through Savin's

"Direct Bill" program. This is a program whereby after receiving the purchase order from me, Savin ships me the machine which I install, but directly bills the customer, and then credits my account.

In July of 1981, after numerous attempts to get Savin to pay their debt to me, I had no choice but to stop paying my bills to Savin. I was frustrated, and felt it was the only way I could get Savin's attention. Within three months, I had accrued a debt equal to the commissions owed me. Finally, Savin got interested. They paid approximately 90% of my commissions, and applied the monies directly to my debt. On February 10, 1982, I mailed a cashier's check for the difference and fully paid out my account.

I then immediately ordered $8,000 worth of supplies and machines. I also set up orders for six new machines, which put me way over my quota for February and March. Business seemed to be back to normal.

On March 18, I received a certified letter, dated March 11, notifying me that I was being terminated as a Savin Dealer, effective immediately (Exhibit A). There has been discussion today of the benefits of a fair and equitable dealer agreement. My Savin Dealer Agreement allowed Savin to cancel me with cause, but only upon 90 days' notice (Exhibit B). While the certified letter did not specify what the "cause" was, several days later I received a letter from Savin's Regional Representative stating that my termination was due to my not servicing the machines to Savin's specifications. Savin had supposedly received 15 letters regarding such complaints, but refused to show them to me. I contact these accounts monthly to get meter readings, and have never had any complaints. In fact, it has been just the opposite, with these customers expressing their confidence in me. This termination without proper notice was only the first example of Savin violating their own agreement.

On April 1, only 2 weeks later, Savin sent letters to all my national and state accounts stating that not only was I no longer an authorized Savin dealer, but also that I was no longer able to service their machines as I would not be able to get parts. My customers were referred to a new authorized dealer in Dillon County (Exhibit C). This was the second example of Savin violating their own agreement because the contract specifically states that upon termination I would still be able to purchase parts and supplies. Granted, it would be at retail price, and on a C.O.D. basis, but I would be willing to pay the higher cost to get them.

I currently have three factory trained service employees, and a small supply of parts, so I will be able to temporarily provide service to my customers. Unfortunately, I have been having great difficulty convincing my customers that I can provide the service they need. A letter from Savin labelling me "unauthorized" is difficult evidence to overcome. The supplies and parts I have in stock will last only a few more months, and then I will begin running short on vital supplies for my entire customer base, not just my national and state accounts.

If S.1256 were law today, Savin would not be able to so easily abuse its dealers. I would not have been terminated, because under the bill termination is allowed only for just, good and significant cause. However, having been so abruptly terminated, I am today not even able to obtain reasonable compensation for goodwill, despite my earnest efforts to build Savin's reputation in my market area. The Retail Dealers Agreement Act would have provided me with such recompense. In the final analysis, the Act will be a significant deterrent to the abusive practices I have described as well as an incentive for manufacturers to work with their dealers rather than arbitratily terminating them, an extreme and punitive remedy.

I would be happy to answer any questions that you may have.

Exhibit A

Savin Corporation

Valhalla
New York 10595
914/769-9500

Roderick D. Marcoux
Vice President
Dealer Operations

March 11, 1982

Mr. Donald Wilcox
WILCOX OFFICE EQUIPMENT
1126 W. Lucas Street
Darlington Highway
Florence, SC 29501

Dear Mr. Wilcox:

This is to inform you that pursuant to Paragraph 10 of your Savin Corporation Dealer Agreement, we have determined to terminate that Agreement and our relationship with your Company, effective immediately.

We direct your attention to Paragraph 12 of the Agreement and request your prompt compliance with the terms of that Paragraph.

Very truly yours,

SAVIN CORPORATION

Roderick D. Marcoux

RDM:lbg

Rec. Certified Mail on 3/18/82

by Don Wilcox

Exhibit B

---

savin

SAVIN CORPORATION
DEALER AGREEMENT
700 Series Copiers

RECEIVED
V.P. DEALER OPERATIONS
MAY 29 1979
ANSWERED
FILE
REFERRED TO

AGREEMENT made as of May 17, 1979, between Savin Corporation ("Savin") and WILCOX OFFICE EQUIPMENT CO. ("Dealer").

A. Savin distributes throughout the United States a line of plain paper copiers which enjoy widespread customer acceptance and a well-earned reputation for reliability and service.

B. Dealer desires to sell at retail the line of plain paper copiers and related products described in this Agreement and to render service to such equipment in a manner which will promote customer acceptance and enhance the reputation of Savin and such equipment and to benefit Savin and Dealer.

NOW, THEREFORE, in consideration of the mutual covenants in this Agreement, Savin and Dealer agree as follows:

1. **Statement of Purpose.** The purpose of this Agreement is to promote and achieve the effective sale, rental and lease ("sale") and servicing of Savin Model 750, 755, 760, 770, 780 and 790 plain paper copiers ("Copiers") and supplies, accessories and parts sold by Savin ("Supplies") for Copiers at retail by Dealer in Dealer's assigned area of primary responsibility. Copiers and Supplies are collectively referred to in this Agreement as "Products".

2. **Appointment.** Dealer is hereby appointed by Savin as a non-exclusive dealer of Products for the area of primary responsibility described on the signature page of this Agreement ("Territory"). Dealer accepts such appointment and agrees to perform to the reasonable satisfaction of Savin the duties, obligations and responsibilities provided for in this Agreement. This Agreement does not apply to or authorize Dealer to sell or service Savin electrostatic copiers, word processors, 600 System copiers and related supplies and accessories, or any other copier or other product marketed by Savin now or in the future.

3. **Operating Standards.**

(a) **Sales.** Dealer will use its best efforts to develop diligently the retail sale of Products to their full potential in the Territory, will develop and maintain the potential for such sales, and will obtain a reasonable share of them. Whether or not Dealer has performed in accordance with this sub-paragraph (a) will be determined by reference to such reasonable criteria, including sales quotas and market studies, as are developed periodically by Savin and communicated to Dealer. Dealer will sell Products only from its authorized sales and service location and only to bona fide retail end users.

(b) **Authorized Sales and Service Location.** In order to provide Product presentation commensurate with the goodwill attached to the name Savin, and to provide prompt and effective service, Dealer will adequately equip, decorate and furnish its authorized sales and service location for the display, sale and service of Products, and maintain and staff that location with experienced, trained and competent personnel in all departments during normal business hours. The authorized sales and service location from which Dealer may sell and service Products under this Agreement is stated on the signature page of this Agreement. Dealer will not move to a new or different location or establish in any other place, within or without the Territory, a branch sales or service office, agency or other business office or operation for the sale or service of Products without the prior written approval of a Vice President of Savin. No officer, employee or representative of Savin has the right to give verbal approval to the establishment of a new or different authorized sales or service location, and any purported approval not in accordance with this sub-paragraph (b) is without legal effect.

(c) **Ownership and Management Participation.** In order to induce Savin to enter into this Agreement, Dealer represents that its present owners and management will continue in the ownership of Dealer and the operation of the authorized sale and service location designated in this Agreement.

(d) **Capital.** Savin, in consultation with Dealer, will determine from time to time the reasonable net working capital deemed necessary for Dealer successfully to carry out its obligations under this Agreement. At no time will Dealer allow the amount of this net working capital to fall below the amount shown on its current financial statements or the amount set by Savin in accordance with this sub-paragraph (d).

(e) **Inventory of Products.** Dealer will maintain inventories of Products and tools as required for effective sales and first-quality service and for purposes of demonstration and training.

(f) **Warranty**

(i) **Customers.** The sole warranties to retail purchasers of Products shall be the standard express Savin copier and drum warranties issued with Copiers and drums respectively. The express warranties exclude all implied warranties, including those of merchantability and fitness for a particular purpose, and all other liabilities, conditions or obligations of Savin. Dealer shall install all Copiers sold by Dealer and deliver and explain the provisions of the standard express warranties to each customer of Dealer at or prior to the time of installation. Dealer shall make no warranty, promise or representation with respect to Products other than those set forth in the Savin express warranties and information bulletins and circulars issued by Savin from time to time. Dealer will discharge the obligations of Savin under such warranties and will perform warranty service and provide replacement parts under warranty at no cost to customers and in accordance with policies and procedures periodically issued by Savin for all customers requesting such service in the Territory. For such service, Savin will credit Dealer's parts account in accordance with then existing warranty policies and procedures.

(ii) **Dealer.** The sole warranty issued by Savin to Dealer shall be that enunciated by Savin from time to time and communicated to Dealer. In exchange for the warranty issued by Savin to Dealer, Dealer hereby releases Savin of any and all claims with respect to the performance of Products.

(iii) **Verification of Claims.** Savin shall have the right to inspect Dealer's books and records during normal business hours relating to all claims made by customers or Dealer under the Savin warranties.

(g) **Service.** Dealer acknowledges the importance of prompt, effective and courteous service at fair rates and undertakes to render such service to all of its customers and in accordance with operating standards and guidelines established from time to time by Savin. To this end, Dealer will organize and maintain a service department and employ a sufficient number of service personnel trained to install and service all Copiers sold by Dealer, and Copiers sold by Savin or others to customers in Dealer's Territory. To insure that customers receive effective service, Dealer shall cause its service personnel to attend, in accordance with Savin programs, service training courses offered by Savin, and Dealer will furnish to such employees Savin training and service manuals and bulletins. Dealer shall expeditiously investigate and courteously handle all customer complaints.

(h) **Reports and Records.** Dealer will furnish, when requested by the Company, a complete statement of Dealer's business, operations and financial condition, including certified (or verified) copies of Dealer's then current balance sheet and profit and loss statement. In order to assist Savin in determining the potential of the Territory and Dealer's performance under this Agreement, Dealer will, upon request, provide Savin with and allow representatives of Savin to review Dealer records of sales and service certified as correct by the management of Dealer.

(i) **Observance of Laws, Rules and Policies.** Dealer will abide by, and insure that its officers and employees abide by, all federal, state and local laws and ordinances, and all rules, regulations and policies issued by Savin from time to time with respect to the sale, servicing and promotion of Products and the conduct and operation of Dealer's business.

4. **Orders.** Dealer will submit orders for Products in accordance with policies and procedures established by Savin from time to time. Savin reserves the right to allocate its inventory of Products in its sole and absolute discretion. All orders are subject to approval and acceptance by Savin. Savin shall not be liable to Dealer or any other party by reason of the failure of Savin to make delivery of Products against any accepted order on account of:

(a) wars, acts of God, governmental action or order, labor difficulties, difficulty in procuring materials, labor or transportation, or any other similar causes;

(b) receipt of orders from all sources for quantities of Products in excess of the capacity of Savin to manufacture or procure, under then operating schedules and conditions;

and

(c) other causes beyond the control of Savin.

5. **Prices.** Savin will notify Dealer from time to time of the prices, charges and terms and conditions of purchase of Products, and will invoice Dealer for Products at dealer prices in effect at the time of shipment.

6. **Title to Products and Risk of Loss.** Title to Products shall remain in Savin, and Savin will have a security interest under the Uniform Commercial Code in such Products, and the proceeds thereof, until Savin shall have been paid in full. Dealer will execute, and Savin is hereby authorized as attorney-in-fact to execute and deliver on behalf of Dealer, any and all financing statements and other instruments which Savin may deem necessary and desirable to protect such security interest. Notwithstanding the retention of title to Products in Savin, Dealer shall bear all risk of loss to Products upon delivery to Dealer f.o.b. Savin warehouse loading dock.

7. **Payment for Products.** Dealer shall make payment of all invoices for Products to Savin at its New York Office, and in accordance with periodic instructions of Savin, without offset, counterclaim or deduction of any kind, within thirty (30) days of the date of invoice. Dealer shall comply with published credit and collection policies of Savin. If the terms of sale and payment for any order are not fulfilled, Savin may decline to make further deliveries except upon receipt of cash or satisfactory security.

8. **Direct Sales by Savin.** Dealer recognizes that in order for Savin and Dealer to market Products successfully, it is desirable for Savin to offer Products to customers under its Major Account Marketing and Government Education and Medical plans, and other similar plans which may be developed from time to time. Dealer acknowledges that Savin may sell directly Products, either through its national offices or through its branches, to any person, firm or corporation within or without the Territory, at prices which may vary from those at which Savin sells to Dealer and other dealers. Dealer agrees, when authorized in writing by a Vice President of Savin, to render assistance to and cooperate with Savin in the marketing of Products in accordance with such plans. In the event of sales or rentals by Savin under such plans, Dealer may receive or be allowed such commission, if any, as Savin in its discretion may deem appropriate, taking into account the circumstances of such sale, including the places of demonstration, installment, sale, and prior contact by Dealer with the customer.

9. **Term.** This Agreement shall become effective upon execution by a Vice President of Savin as of the date stated on Page 1, and shall continue in effect until December 31, 1980, unless either Savin or Dealer shall have terminated this Agreement under Paragraph 10.

10. **Termination.**

(a) Dealer or Savin may terminate this Agreement without cause by giving written notice specifying the date of termination, which date shall not be less than 30 days, or such longer period as may be required by law, subsequent to the date of notice.

(b) Savin may terminate this Agreement by giving written notice to Dealer specifying the date of termination in the following circumstances:

(i) breach by Dealer of a material term or condition of this Agreement;

(ii) any material misrepresentation by Dealer as to the ownership, management or business operations of Dealer;

(iii) the liquidation, dissolution, merger, consolidation or change of management or ownership of voting stock of Dealer;

(iv) the bankruptcy or insolvency (no matter how evidenced, including the repeated failure to pay invoices for Products when due) of Dealer;

(v) the issuance by Savin of a new form of dealer agreement; or

(vi) the discontinuance by Savin of its present method of distributing Products.

11. **Extension of Term.** Savin may extend the term of this Agreement by giving written notice of such extension at any time prior to termination.

12. **Effect of Termination.**

(a) Upon the termination of this Agreement for any reason:

(i) Dealer shall not engage in any activity which might imply or represent that it is an authorized Savin dealer, and shall, at its sole expense, take all steps necessary to remove any listing in any telephone directory or other publication that it is an authorized Savin dealer;

(ii) Dealer shall assign to Savin or to its nominees all orders for Products and deposits received from customers, and all orders by Dealer for Products shall be cancelled, if Savin so elects;

(iii) Dealer shall, at its sole expense, discontinue the use of Savin trademarks, trade names, labels and copyrights and materials and signs bearing the name Savin or any other trademark or trade name of Savin, and will remove such names and trademarks from letterheads, stationery and other forms used by Dealer;

(iv) Dealer shall, at its sole expense except if Dealer shall have paid for them, immediately return to Savin all parts books, service manuals, and signs or advertising materials illustrating Products or bearing the name Savin and all similar materials supplied by Savin;

(v) The acceptance of any order from or the sale of any Products to Dealer after termination shall not be construed as a renewal or extension, nor as a waiver of termination;

(vi) Termination shall be without prejudice to the rights of either party to moneys due or to become due under this Agreement"

(vii) Dealer acknowledges that its breach of the obligations of this Paragraph 12 and Paragraph 13 will cause Savin irreparable injury, and consents to the issuance of preliminary and final injunctive relief to obtain or enforce Dealer's compliance; and

(viii) Dealer will be liable and will reimburse Savin for all costs incurred, including the maximum attorneys fees recoverable, in any action brought by Savin to recover moneys due under this Agreement or to obtain Dealer's compliance with this Agreement.

(b) Upon termination of this Agreement by Savin, Savin shall repurchase from Dealer, upon written request made by Dealer within 30 days of termination:

(i) All new, unused and undamaged Products purchased by Dealer from Savin at the invoice price paid by Dealer for those Products; and

(ii) All special tools and equipment in usable and good condition purchased by Dealer from Savin during the term of this Agreement at a price to be mutually agreed upon by Dealer and Savin.

13. **Trademarks.**

(a) Dealer acknowledges that Savin has the exclusive ownership rights in and to use the Savin trademarks, service marks and trade name in connection with the sale and service of Products and supplies, and agrees it shall never contest such rights.

(b) Dealer is hereby granted a non-exclusive right and license to use Savin trademarks and service marks in connection with the sale and service of Products under this Dealer Agreement. The term of such right and license shall terminate upon the termination of this Agreement.

(c) Dealer shall sell Products only under Savin trademarks, in accordance with instructions as shall have been issued from time to time by Savin. Dealer shall not remove trademarks or serial numbers from or alter any of the Products or engage in any other activity which will in any way tend to impair the reputation of Savin. Dealer will not use or adopt any name, trade name, trading style or commercial designation used by Savin, or use the word Savin in Dealer's trade or corporate name.

(d) Dealer agrees to discontinue immediately, at its sole cost and expense, any use of Savin trademarks and service marks which, in the sole judgment of Savin, is inconsistent with the reputation and standing of Savin, or with the business, advertising or public relations policies of Savin, or is misleading or confusing as to the rights or status of Dealer under this Agreement.

14. **Products of other Suppliers.** Dealer understands that it is the policy of Savin that Dealer is not required to refrain from purchasing copiers and duplicators, and related parts and supplies, of other suppliers as a condition of being permitted to purchase Products. Dealer agrees to notify Savin in the event Dealer enters into an agreement to sell or service copiers or duplicators and related parts and supplies of other suppliers.

15. **Dealer Not An Agent.** The relationship provided for in this Agreement is that of seller and buyer, and neither Dealer nor the employees of Dealer shall be considered employees or agents of Savin for any purpose whatsoever. Dealer is not granted any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of Savin or to make any representation of any kind in behalf of Savin, except for the warranties of Savin with respect to Copiers and drums.

16. **Assignment.** Neither this Agreement nor any interest in this Agreement may be assigned, subdivided, or transferred by operation of law or otherwise by Dealer. Any purported assignment by Dealer in violation of this Paragraph is void. Notwithstanding the foregoing, Savin may assign its interest, rights and obligations under this Agreement to any firm or corporation, but such assignment shall not relieve Savin from its obligation to pay Dealer any sums of money due or to become due to Dealer prior to the effective date of such assignment.

17. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

18. **Severability.** If any term or provision of this Agreement shall to any extent be found to be invalid, void or unenforceable, the remaining terms and provisions shall nevertheless continue in full force and effect.

19. **Entire Agreement.** This Agreement supersedes and terminates any and all prior agreements, oral or written, between Savin and Dealer with respect to the sale and servicing of Products. Dealer agrees that it has not relied on any representations, warranties or promises not explicitly stated in this Agreement, that no oral statement has been made to it that in any way tends to modify or waive any of the terms and conditions of this Agreement, and that this Agreement is the entire arrangement between Savin and Dealer with respect to the sale and servicing of Products. No part of this Agreement, which is personal in nature, may be modified or supplemented except by a written instrument signed by a Vice President of Savin and by an officer of Dealer. In the event of interpretation of, or dispute under this Agreement, or term or any provision of this Agreement, any course of dealing or trade usage or custom, or course of performance shall not be relied on or referred to by Savin or Dealer to contradict, explain or supplement any provision of this Agreement, it being acknowledged by Savin and Dealer that this Agreement is intended to be, and is, the complete and exclusive statement of the Agreement with respect to its subject matter.

Authorized Sales Location: (Darlington Highway, Florence, S.C. 29501)

Territory: (Counties in the State of South Carolina: Darlington, Florence, Williamsburg)

NAME OF DEALER: WILCOX OFFICE EQUIPMENT CO.

TYPE OF ENTITY: (Corporation, Partnership, Sole-Proprietorship) Corporation

STATE OF AUTHORIZATION: South Carolina

AUTHORIZED SIGNATURE AND TITLE: George H Wilcox President

ACCEPTANCE BY SAVIN CORPORATION At Valhalla, New York: Vice President

savin

Savin Corporation

Valhalla
New York 10595
914/769 9500
Cable: Savintel, N.Y.

Dear Savin Dealer:

We are pleased to announce and enclose the original and one copy of the Savin Amendment to the Dealer Agreement for each of your authorized locations. At the Savin Dealer Council meeting and at NOMDA, several of your dealer representatives expressed their and your concerns about the term of the dealer agreements. In particular, they stated that if a longer term were provided, it would enable them to obtain better financing and to improve their dealership operations. While the amended contract still provides for early termination by either Savin or Dealer, it does provide and contemplate a three year term. The amendment also provides a new mechanism to facilitate the addition of new Savin copier products to our agreement without necessitating written amendments.

We at Savin are dedicated to the strengthening of our dealer body. The amendments are the result of our continued research and study into the further development of a fair and equitable agreement that is in both Savin's and our Dealer's best interests. We are satisfied now that as a consequence of this analysis, we have improved the agreement.

With the number of dealers we have, it would be impossible to develop a special contract for each dealer; therefore, the enclosed is the standard amendment being issued to System 600/700 dealers. As you will note, the effective date after execution is as of January 1, 1981. After you have reviewed the enclosed, please sign the original and one copy for each authorized location and return them to me in Valhalla, New York, for execution on behalf of Savin. We will return a signed amendment to you for your files.

Please return the enclosed amendment, unmodified and properly signed, no later than December 31, 1980, otherwise we may not be able to continue to process your orders for Savin 800 products.

Savin appreciates the efforts you have extended to promote Savin Products, and we look forward to a relationship which will continue to be mutually beneficial and profitable. You may be assured that we will continue to provide the support programs and services best suited to enhance your marketing efforts for Savin copiers.

If you have any questions, please contact your Area Manager.

Sincerely,

SAVIN CORPORATION

Roderick D. Marcoux
Vice President/Dealer Operations

RDM/rc
Enclosures

SAVIN CORPORATION

DEALER AMENDMENT

All Series Copiers

Paragraph 1 Amended to read (see page 1 of Agreement):

1. STATEMENT OF PURPOSE. The purpose of this Agreement is to promote and achieve the effective sale, rental and lease ("sale") and servicing of Savin Model 750,755, 760, 770, 780 and 790 plain paper copiers and such additional copier products as Savin shall in its sole discretion designate in a written instrument signed by a Vice President of Savin ("Copiers") and supplies, accessories and parts sold by Savin ("supplies") for Copiers at retail by Dealer in Dealer's assigned area of primary responsibility. Copiers and Supplies are collectively referred to in the Agreement as "Products".

Paragraph 9 Amended to read (see page 3 of Agreement):

9. TERM. This agreement shall become effective upon execution by a Vice President of Savin as of the date stated on Page 1, and shall continue in effect until December 31, 1983, unless either Savin or Dealer shall have terminated this Agreement under Paragraph 10.

Paragraph 10 (a) Amended to read (see page 3 of Agreement):

10. TERMINATION
(a) Dealer or Savin may terminate this Agreement without cause by giving written notice specifying the date of termination, which date shall not be less than 90 days, or such longer period as may be required by law, subsequent to the date of notice.

NAME OF DEALER: Wilson Office Eq.

TYPE OF ENTITY:
(Corporation, Partnership,
Sole-Proprietorship) Corp

STATE OF AUTHORIZATION: S.C.

AUTHORIZED SIGNATURE
AND TITLE:

ACCEPTANCE BY
SAVIN CORPORATION
at Valhalla, New York: ______________
Vice President

Sent 12/29/80

Exhibit C

savin

Savin Corporation

5750 N. Hoover Boulevard
Suite 114
Tampa, Florida 33614
813/884-4904

March 24, 1982

Nucor Corp./Vulcraft Div.
1501 W. Darlington St. Ext.
Florence, SC 29501

To Whom It May Concern:

In accordance with our continuing program to upgrade Savin Corporation's commitment and service to our customers, we have authorized Herald Office Supply as your Savin Dealer Representative in the counties of Florence and Darlington in South Carolina.

Please advise the personnel in your organization responsible for calling for service, reporting monthly meter readings, and supply needs, that effective March 22, 1982, these activities will be directed to the following location:

HERALD OFFICE SUPPLY
P.O. Box 1288
Dillon, SC 29536
803/774-5155

Sincerely,

Ron Hutcherson
Southern Area Manager

RH:rc

cc: Herald Office Supply

PREPARED STATEMENT OF KENNETH STEPHENSON

Good morning. My name is Kenneth Stephenson, and I am president and owner of Central Office Products, a small dealership in Salina, Kansas, which is about 100 miles west of Topeka. My office machine business does about $1 million in sales each year, and I employ 21 men and women, with two servicemen supporting each sales person. I have now been in business almost thirty years, starting out in 1953, as most office machine dealerships did then, primarily in typewriters.

In those early days, I sold only the Royal typewriter, a name which was then synonymous with a fine American-made product. My relationship with Royal was a smooth one, as I had bought my business from a previous Royal dealer in Salina. Whatever problems did occur were resolved amicably.

By the late 1960's when most all typewriters for office or business use were electric, Royal began to experience product reliability problems. These problems were shielded from the end-user by dealers like myself so that we could preserve our credibility in the marketplace and our commitment to the customer. After all, these consumers are often our friends as well as the source of our livelihoods.

In one particular situation with Royal, I was burned badly because the manufacturer had failed to field-test its equipment properly. The product in question was the Model 590 electric typewriter. This model was aimed primarily at the school market, and was introduced in late Spring. We sold 53 of these typewriters to schools in our territory, but did not deliver them until August. Soon after school opened in September, I began receiving an avalanche of phone calls about the inoperability of the equipment we had sold to our customers in good faith, based on our sales rep's representations to us. Eventually, after spending thousands of dollars on attempts to keep the machines functioning, I wound up taking at least 85% of the products back. Needless to say, I really took a beating.

My primary concern with the Royal people, however, originated when the German conglomerate, Adler-Triumph, purchased the Royal Typewriter Company some ten years ago. At that time, Adler had been using its dealers to sell Adler machines in the U.S. market, and Royal had its own separate network of dealers. When the two companies merged, the management of Adler-Royal began to turn the largely branch-oriented, urban sales force of Adler into one based on dealers, as Royal's had always been. Now, however, the two separate marketing arms were to sell the very same product.

I saw the sign of things to come when a close friend and fellow Royal dealer 90 miles away in Hays, Kansas had a new dealer set up in Hays by Adler-Royal. Before long, exactly the same thing happened to me in Salina. It seems that such decisions were being made in Germany, despite the displeasure of the Royal marketing organization here in the U.S.. Nevertheless, Adler-Royal, with no notice whatsoever, and with no record of criticism of my performance, signed up my top serviceman and one of my best salesmen as a dealer in Salina, selling exactly the same products as I had been marketing for years. I was paying my bills, properly servicing the machines at my customers' establishments, meeting my quotas and promoting the name and goodwill of Royal--and had been doing so for 20 years!

What's worse, the proprietors of the new company, Midwest Business Machines, weeks before they left my employment, photocopied my service records and customer lists, advised existing good accounts not to renew their service contracts, and otherwise delayed orders so as to be filled by the new dealership. Midwest also picked up the Olivetti line; yet when we would convince a prospect to select the Royal line, Midwest would "piggyback" on our efforts to win the account. Although my company lost many of our service contracts when Midwest was set up, we have stabilized. Of course, we had to expend considerable sums of money to train new sales and service personnel, and there were the usual intangible costs. Still Adler-Royal made no attempt to adjust my sales quotas downward to reflect the new dealer in town, and I received no explanation as to why if I was doing a good job an additional dealer was warranted in the first place.

I would like to go on to describe another set of problems similar to the one I had earlier with Royal. It concerns the product reliability--or the lack of it--of plain paper copiers. Central Office Products has been marketing Sharp's line of calculators since the early 1970's. As one of the first truly electronic products, the desktop calculator manufactured by Sharp was my very first contact with a Japanese company and its philosophy of business.

Since I had been promoting Sharp's name in my market area, Sharp turned to me when it began to produce and market copiers. Its Model 710 was one of the first plain paper copiers made for small volume use. Virtually site unseen, I purchased a number of these machines and immediately sold them to my best customers. I was afraid that if I waited to see how they performed, the Sharp franchise would not be available at a later date. Manufacturers customarily use such tactics to push new, non-field tested equipment on dealers. These dealers are subsequently forced to remedy the defects which later appear in their customer's establishments.

I had no idea so many problems tied to the very functioning of the equipment would occur all at once: fusing problems, overheating, uncontrollable copy quality, and even burnt originals. I would call Sharp to complain about these defects, only to hear incredulously that the breakdowns were probably the result of Kansas' dry wind or wheat chaff. By the time "retrofit kits"--or temporary changes in the product's design to solve a particular problem--finally arrived, my customers had gone elsewhere. I was finally forced to drop Sharp's copier line because the enormous costs associated with it were threatening my profitability as a business. I was spending more time and money fixing Sharp's equipment already in the field than selling new products. Now that I have dropped the copier line, I must purchase expensive parts from Sharp directly, when I can get them, unless the parts I need are available from other Sharp dealers.

Because of these problems with Sharp, I began shopping around for another copier supplier. I was visited by a representative from Saxon who promised that his product used a different technology from the Sharp machine which avoided the heat process that had worked so poorly. I agreed to buy five copiers at a cost of $3,000 each. Not one performed as I had been promised, and after a year of malfunctioning and unreliability, I was able to salvage less than $3,000 for all five machines which had been returned to me for copiers which worked. All in all, I lost over $12,000 on that fiasco.

During this period in the late 70's, Savin had been developing a market for its copier which happened to use a technology similar to Saxon's (except that the Savin product worked). In my case, the very same sales representative who had sold me the five faulty Saxons came to me marketing the new Savins. I turned him down flat, only later to find that the Savin copier worked fairly well. I have subsequently picked up the Savin line by acquiring the right to sell the equipment from a Wichita-based dealer, Business Systems, Inc., who originally was responsible for the territory. Although I must pay a higher price, due to payment of an override on all my purchases, access to good equipment is preferable to having to deal with a manufacturer known to avoid fair and equitable treatment of its dealers.

In conclusion, office machine dealers in Kansas and elsewhere in the United States should not have to suffer because our suppliers are able to use coercive and abuse marketing practices at will. Royal estabished my employees as a competing dealer in Salina for no reason that I know of despite twenty years promoting its good name in my market area. Sharp and Saxon shipped me faulty products, directly contrary to the representations made to me by their sales reps. So far, I have been fortunate with Savin, shielded as I am from it by an intervening dealer.

I am convinced that the Retail Dealers Agreement Act (S.1256) is vital to the very survival of our industry. With the continued development of more expensive and sophisticated office machines, I am fearful that the independent dealer will no longer be able to afford to protect the consumer from the manufacturer's product deficiencies. These companies must assume more responsibility for product failure. Certainly, the customer is not best served in such an environment.

I would be happy to answer any questions that you may have.

PREPARED STATEMENT OF MERLIN JEITZ

Good morning. My name is Merlin Jeitz. I am president and owner of Cook's, Inc. in Watertown, South Dakota, which I founded 23 years ago. My company carries a full line of office equipment: from furniture and office supplies to office machines, including electronic cash registers, copiers and typewriters. I have been a dealer for Olivetti since 1959 and for Sharp since 1969. In the past, I have been a dealer for Saxon copiers and Delta cash registers. My business is of average size, with 18 sales and service personnel.

Although I am not an officer of NOMDA, I am active in our association and have had the opportunity to meet many other members and discuss the problems facing our industry. As the previous witnesses have pointed out, because of the overwhelming advantage manufacturers have in economic bargaining power, they have a stranglehold on dealers, forcing us to play by their rules or not be in the game at all.

I would like to speak for a few minutes about several specific examples of the manufacturer's "Dealer be Damned" attitude which their economic power permits them to adopt. I, along with dealers all over the country, have suffered from such abuses as:

--arbitrary establishment of sales quotas;

--manufacturer misrepresentations regarding the terms of my dealer agreement as well as product reliability;

--coercive practices adopted by suppliers in selling new products and in establishing new dealers.

The sales quota system established by manufacturers appears to have no relationship whatsoever to the actual size and potential of my market area. No one has ever given me an explanation of how the quotas are established in the first place. Frankly, the entire system seems irrational. When I am given a quota which compels me to sell more equipment percentage-wise than my market could ever absorb, it is clear to me that decisions affecting my very livelihood are not being made in South Dakota, but far away in corporate headquarters in Tokyo. I have made suggestions that our quotas be determined according to county purchasing power derived from national statistics compiled by the Business Equipment Manufacturers Association. However, my ideas have apparently fallen on deaf ears, as my suppliers continue to arbitrarily set my quotas.

A quota system created and imposed unilaterally on dealers by manufacturers gives those manufacturers great latitude in terminating dealers. It is an easy way for them to avoid responsibility for paying dealers the allowances promised for meeting given quotas. Another variation of quota abuse occurs when manufacturers establish quotas knowing that they do not intend to produce or import enough machines to fill all the orders were every dealer to meet his assigned quota. Some manufacturers offer a QPA or Quarterly Performance Allowance, which is an incentive to dealers to sell more by giving them a certain percentage of sales exceeding a set figure. In addition, advertising allowances are given to dealers only if they can meet their quotas. Thus, when a quota cannot possibly be met, or when the manufacturer cannot ship enough equipment to meet dealer orders promptly, the QPA and the obligation to pay for advertising allowances is avoided, which together can add up to as much as an eight percent discount to the dealer.

Another problem facing dealers in my part of the country is that manufacturers often do not offer written contracts. If a written agreement is used, many important elements are oral. All, of course, on a take it or leave it basis. Even if there is a written contract, it is of no real assistance to the dealer in one very important area: financing. Most dealers have to borrow money to pay for their inventory. Yet, what banker is going to lend me $20,000 for new products when he sees an equal amount of already inventoried products in my warehouse which are worthless because of my supplier's misrepresentations about the product's capabilities or gross defects which appear only when the goods have been placed with my customers in the field?

It is natural to ask why a dealer would take machines without seeing or testing them. The answer lies in the manufacturer's coercive selling practices. For example, in July 1980, at NOMDA's Annual Convention, Sharp introduced a new copier, which it claimed to be the state of the art. They did not have actual models with them; dealers were told the copier was in production and was being tested in Japan. Furthermore, Sharp stated that if orders were not placed immediately, there would be delivery problems in the future. The choice was clear: should I order machines, running the risk that, as in the past, the machines have in fact not been fully tested and have problems, or should I let my competitors buy and market them, while I am still waiting for delivery? Almost every dealer will opt to buy the machines, and the manufacturer knows it.

Another abuse, frequently practiced by Olivetti, is that their sales reps will offer a new machine to me sight unseen, "guarantee" that it is a good product, and "promise" that if I buy a substantial number, he will "try his best" to move it to other dealers if it does not meet my expectations. Yet, when problems do develop, all these guarantees and promises are forgotten.

Both of the above examples illustrate that manufacturers are treating the U.S. market as nothing more than a field-testing ground. Intent on pushing out new products as rapidly as possible, manufacturers avoid responsibility for defective products by passing all after-sales service requirements onto dealers. Manufacturers do not have warranty obligations to end-users and do not hesitate to force dealers to install retrofit kits at their own expense, correcting defects which should have been solved in Japan. Often, a "new" model is nothing more than the previous model with some bugs worked out.

It is inequitable that responsibility for service rests solely on the dealer, thus insulating the manufacturer's profits from frequent warranty claims and servicing requirements. Unfortunately, the problem usually gets worse. There is a Savin dealer in Rapid City, whose major customer was an Air Force base. Savin, without warning, began selling directly to the base, thereby undercutting its own dealer. Not only did the dealer lose sales, but Savin told him to assume all service responsibility, with obvious consequences for his costs. When the dealer objected, he was told that he would be terminated for his failure to do as the manufacturer wished.

Inequitable practices involving the establishment of new dealers and termination of existing dealers have affected me as well. The efforts and investment of dealers in building a market area are irrelevant to manufacturers who are merely interested in moving products. Failure to meet unreasonable quotas is always an available excuse to place a new dealer in a market area successfully built by an existing dealer. Other practices are more subtle, yet equally inequitable. Let me give you a personal example. Sharp named a new dealer in Mitchell, South Dakota, which is 125 miles from me, clearly not within my market area. Yet, with Sharp's knowledge, the Mitchell dealer established branch offices squarely within my backyard. Thus, at no cost to him, the Mitchell dealer reaped the benefit of the goodwill and advertising I had generated on Sharp's behalf. All of my time, effort, and money to build name recognition for Sharp in the Watertown area was completely wasted. Of course, I was not consulted nor given the opportunity to discuss with Sharp why such an action was warranted. Yet, my quota remains just as high, and I am deprived of the QPAs and advertising allowances, both of which are crucial to my continued profitability.

Words like "retaliation" are strong, and should not be used frivolously. I would like to relate the events which followed my appearance before the Subcommittee on Business, Trade and Tourism of the Senate Commerce Committee last October and have you draw your own conclusions.

Several days after my appearance before the Subcommittee, I was contacted by an executive of Sharp, who expressed concern as to the reasons for directing my testimony at them. I explained that other manufacturers were also mentioned, i.e., Olivetti and Saxon. I was then asked "Why did you say those things about Sharp?" My response: "Because they are true."

Sharp then sent a letter to NOMDA's president, Senator Pressler, Mr. Nelson, and myself refuting Mr. Nelson's and my testimony. The letter closed with Sharp's wish that if I did not "correct" my statement, NOMDA should "disassociate itself" from my testimony.

Until recently, my territory for Sharp has been Codington and Brown Counties. In July of 1981, I closed my Brown County branch office, but did not abandon the territory. Several months later, Sharp approached me, claiming Brown County needed more coverage. I explained that this was temporarily impossible, as I had closed the branch and my people had gone with a competitor. Sharp suggested they might set up another dealer, and asked my opinion of two of my competitors as possible candidates. I advised them against one competitor, because he was a dealer we could not work with. This competitor turned out to be the dealer subsequently set up as the new Sharp dealer.

The discussion over, I was lulled into a false sense of security, believing that we would continue to be the authorized Sharp dealer in that area. Soon thereafter, a bank, about 35 miles from my office, was interested in purchasing a copier. Several different brands were under consideration, and we provided a Sharp demonstration model. When we contacted the bank to see if a decision had been reached, we were pleased to hear that the Sharp copier had been selected. My pleasure quickly turned to dismay, however, when we learned that the bank had received two quotes for the Sharp copier--mine and that of a dealer out of Brown County. I immediately wrote to Sharp, seeking an explanation. Sharp management replied that this action was "company procedure," and reminded me that I had been told another dealer was going to be set up. In response to my argument that in our conversation earlier there was no definite decision made regarding a new dealer, Sharp explained that they did plan to tell me--after the new dealer began selling machines.

The point of this whole story is that Sharp made no attempt to explain what sales performance was expected in Brown County, as if it really would have affected its decision to establish a new dealer there. Moreover, Sharp did not notify me that a dealer was being set up in my market area, which seems the fair and equitable thing to do at the very least. I now wonder to what degree these actions on Sharp's part were induced by my statements before Congress last October.

I have experienced more than quota problems and new dealers being set up in my territory. The termination problem mentioned by other witnesses has affected me as well. A few years ago, I was a dealer for Saxon copiers and initially bought 15 units. Unfortunately, none worked even reasonably well. I paid $4,000 per unit and then was forced to spend another $4,000 per unit on retrofits and other repairs. These still did not make the copiers functional. In the end, I could not sell a single one of Saxon's copiers. Then, Saxon wanted me to purchase its new model. When I refused to do so without receiving some financial redress for this previous fiasco, I was terminated with no compensation for my previous inventory or expense.

Mr. Chairman, I can say unequivocably that were the Retail Dealers Agreement Act law today, I would not hesitate to use it to seek redress from the grossly unfair practices of companies, such as I have described today, which seek to intimidate their dealers and subject them to financial hardship and abuse. Clearly, a good faith standard would set some very broad guidelines without unnecessarily interfering in dealer-supplier contracts. More importantly, I firmly believe that it would be an impediment to these manufacturers' continuation of previously documented abuses, allowing dealers like myself from having to worry about legal remedies to keep their small businesses afloat. I should rightfully be concerned only about sales, service and customer satisfaction. You can make that possible through support of S.1256.

I would be happy to answer any questions that you may have.

PREPARED STATEMENT OF RICHARD P. NELSON

Good morning. My name is Richard P. Nelson, and I am president of Ohio Business Machines in Cleveland, Ohio. I am an active member of the National Office Machine Dealers Association,especially in the educational seminars which NOMDA sponsors. I have been an office machine dealer for five years. Prior to starting my own business, I worked for Apeco, a domestic photocopier manufacturer, starting as a salesman and leaving as the West Coast general manager. My responsibilities as general manager included managing dealers in 13 states. In a sense, then, I can give you perspective from both a dealer and a manufacturer.

Before providing specific examples of the problems jeopardizing our industry, I would like to underscore several points made by previous witnesses. First, the manufacturer's dictatorial power over dealers is a national problem, transcending state boundaries. I have met 3,000 dealers in my NOMDA activities from every state in the Union. The message has always been the same--manufacturers are guilty of the same practices in Ohio, New York and California. In fact, I was not at all surprised to hear that dealers in Canada and England suffer from the same abuses we do in this country.

Unfortunately, we are not talking about only one or two manufacturers. Virtually all of the overseas manufacturers are guilty of the same practices. Thus, a dealer cannot escape the intimidation of one manufacturer by going to another. Manufacturers of the most popular machines realize the control they have over dealers and are taking full advantage.

It is important to realize that dealers simply do not have the tools to force the manufacturer to negotiate on a truly arms length, good faith basis. Collective action by NOMDA is, of course, illegal, and lawsuits under the existing statutes have not been effective in protecting dealers' rights.

I turn now to certain specific examples, which will illustrate just how far removed the manufacturers are from any notion of good faith and fair dealing. One of the most important issues facing dealers are sales quotas unilaterally and arbitrarily imposed by manufacturers. Quotas are important in that they give rise to advertising allowances and other sales incentives, and are used by manufacturers to determine placement of new dealers and the termination or nonrenewal of existing dealers. Manufacturers have had no incentive to provide realistic quotas. From their standpoint, it is far preferable to continue using quotas as swords dangling over dealers' heads rather than as dealer goals, since they are a highly useful dealer control tool. Manufacturers believe they can terminate a dealer who doesn't meet quotas in good conscience no matter how artificial his quota may have been. Since December 2, 1981, it is a fact that Sharp has put over 40 dealers on probation, and cancelled at least 15 dealers.

Let me give you some specific horror stories. In 1980, Sharp had a quota of 83,000 copiers for the U.S. market. In actual fact, only 41,000 copiers were exported to the U.S.--less that 50% of the quota. This was not a mistake. As a member of the Sharp Dealers Advisory Council, I had the opportunity to meet with Sharp's top management. At one such meeting, I was astonished to hear the president, Mr. Sagawa, congratulate the national sales manager for having "a good year" and being over quota. When I raised the obvious disparity between the in-house quota and that given to dealers, the response was that maybe the dealers' quota was too high, but that would be taken care of next year. Just to show how much good faith Sharp demonstrates, the quota for 1981 was reduced to 82,300 copiers, a far cry from the 83,000 quota in 1980! Moreover, the president informed us that he expected that 55,000 would be the absolute maximum number of copiers imported into the U.S. After I gave testimony on S.1256 before the Senate Commerce Committee last October, Sharp sent a letter to Senator Pressler, the president of NOMDA, Mr. Merlin Jeitz and myself refuting Mr. Jeitz's and my testimony. In this letter, Mr. Castrianni, The Vice President of the Sharp Copier Products Division, pointed out that "the quotas Sharp assigns to its dealers are based on a statistical formula for estimating production sales in the dealers' geographical area which we developed with the advice and approval of the Sharp Dealers' Advisory Council of which Mr. Nelson is a member."

It is a fact that due to Sharp's unfair and unethical quota allocations, the Advisory Council suggested fair and equitable allocations for Sharp's approval. But there is an implication that the dealers participate in the establishing of quotas, and that is absolutely untrue.

All the Sharp Advisory Council did was direct Sharp to give a fair county-by-county distribution across the United States. The net effect would be, if the business buying power statistics indicated that, for example, Cuyahoga County, Ohio (Cleveland), accounted for 1% of the United States buying power index, it would be assigned only 1% of Sharp's total quota; not 2% or 3% because a dealer was doing well. Manufacturers in the past have over-loaded an area with quota because of a dealer's excellent performance.

The gross total of machines that Sharp uses to base its allocations (40,000 units per year, 80,000 units per year, etc.) has always been determined by Sharp, and dealers have had absolutely no approval or refusal rights. Sharp sets quota on individual machine units based on what they want to manufacture, and dealers are assigned specific quotas by model. Dealers have no say so in this system. In fact, a dealer can be required by Sharp to sell 200 units in a year, but if the model mix of the dealer's performance is not in agreement with Sharp's model mix, he would be considered under quota.

Dealers have urged Sharp for years to go on a dollar volume quota, but our requests have been denied. Dollar volume would be much fairer and more accurate, but by maintaining the machine model quota system, Sharp is better able to manipulate its dealers.

At one time I proposed to Mr. Castrianni in the presence of the Sharp ombudsman, Robert Woletz, that Sharp eliminate the word "quota" and announce Dealers Machine Goals. Then at the end of the fiscal year, Sharp would total what had actually been sold and delivered in the United States, and that would be the quota figure that Sharp dealers would be measured against. This, of course, would be completely fair because we would be dealing with actual dealer numbers against actual manufacturer numbers.

Mr. Castrianni agreed and then refused to put it in writing, saying that it wasn't feasible.

In addition, Sharp stated in this letter that quotas are only used for the measurement of sales performance for the mutual benefit of Sharp and its dealers. Well, I don't think that all the dealers on probation nor all the cancelled dealers would feel that Sharp's quotas are to their mutual benefit.

When Mr. Castrianni mentioned in his letter that quota figures were set on a provisional basis for a new product line, I was really not sure of what he was talking about. My testimony specifically related to the years 1980 and 1981 and, even though Sharp at the very end of 1981 set a temporary quota on the Sharp 770 Model, it appears on my quota figures as an existing quota figure, not a temporary one. In fact, the quota was established for all dealerships before the product even reached the United States and has run cumulatively since it was originally set.

To reiterate, the reason manufacturers maintain such unreasonable quotas is to keep the dealers in line, to manage the territories by using failure to meet quotas, to saturate market areas, and as an excuse for termination.

The inequitable placement of new dealers is another serious problem. It is a fact that in virtually every major urban area in the United States, Sharp has multiple dealers and in many major cities, they have three, four or more authorized dealers.

While manufacturers generally do not grant territorial exclusivity, their pitch to new dealers is replete with verbal assurances not to interfere with his markets. It is important for a dealer to know that his hard work and investment in building a market will be rewarded and that the fruits of his efforts will not be stolen. When I started in business as a dealer, I was promised by a Sharp Vice President that I would be left alone to develop my market. Sharp did not hesitate subsequently to appoint a new dealer 15 miles from me, and I did not object. However, two days later, that new dealer opened a branch virtually next door to me. In doing so he was able, without cost, to take advantage of all the heavy advertising for Sharp I had undertaken and all the goodwill I had generated.

In his letter, Mr. Castrianni makes reference to this new dealer established near my Cleveland dealership by stating it is "located in Akron, Ohio." The implication is that Akron is a far enough distance away from Cleveland. The fact remains that the Cleveland/Cuyahoga County market abuts the Akron/Summit County market. They actually touch, and are in fact right next door to one another, being sister counties like Minneapolis/St. Paul.

Who is the loser when manufacturers saturate a market with dealers? Certainly not the manufacturer. It is the dealers and the consumers who are hurt because dealers must cut profit margins to unreasonable levels and even scale back service. As you know, the key to any office machine is service and supplies, which, over the life of the machine, cost more than the initial price. So, in the end, it is the consumer who suffers. Manufacturers seem to consider service unimportant because it is the dealer's responsibility.

Yet, when the manufacturer has wholly-owned sales branches which compete with independent dealers, they sing a different tune. Last year I testified as an expert witness in a trial in Oregon state court in a suit brought by a prospective dealer against Canon. The prospective dealer had decided to take on the Canon line, been given an oral contract, and sent his employees to Canon's service school. However, when Canon discovered that the dealer had a branch in Los

Angeles which could compete with Canon's wholly-owned sales branch, he was cancelled.

Another example of how manufacturers bend the rules they themselves have established is the implicit sanction they give to unauthorized dealers, dealers who do not have even an oral dealership agreement.

In Los Angeles, California, there is one authorized Sharp dealer, but many Sharp machines are sold by unauthorized Sharp dealers. These dealers were providing inadequate service. Supposedly, through a quirk in California law, the abused consumer could sue not only the unauthorized dealership that sold the equipment, but the manufacturer of the equipment as well.

Donald Mossman, General Counsel for Sharp Electronics Corporation, phoned Ronald Shapiro, the only Sharp authorized dealer in Los Angeles County at that time, and told him about Sharp's problem with these lawsuits. Mr. Shapiro announced to Mr. Mossman that his company's policy was only to service those machines sold by his company, Advanced Images. Mr. Mossman told Mr. Shapiro that he appreciated his policy but that Sharp was in a real bind and could not continue to stand the risk of lawsuits. He further stated to Mr. Shapiro that if Mr. Shapiro continued to refuse to service anybody with a Sharp machine who wanted service, Sharp would be forced to open up a copier branch in Los Angeles.

Since I first told this story before the Senate Commerce Committee last October, additional Sharp authorized dealerships have been established in the Los Angeles area.

There has been one more interesting turn of events since my testimony in October. I was the Chairman of the Sharp Advisory Council. Sharp was certainly not obligated to form a dealer council or to appoint me or any of the other current members to the council. However, Sharp saw value, indeed the necessity, of opening a "line of communication between Sharp and the Sharp copier dealer network". For the council to serve as an effective forum for the honest and sincere exchange of ideas, it is important that the council not be perceived as simply the alter ego of Sharp. This was apparently understood by Sharp when it structured the council guidelines, for the guidelines provide:

(A) That members of the council will be selected by the management of Sharp "with the advice of council";

(B) That the council members "choose from their ranks a chairman, vice chairman and secretary/treasurer to serve for a period of five (5) council meetings with an election being held to select new officers";

(C) That the guidelines may be amended "by the council in consultation with Sharp"; and

(D) That Sharp "nominate" replacement for members, subject to council confirmation.

Sharp historically has held council meetings three to four times a year. The last meeting I chaired was September 1, 1981. On May 10, 1982 I was asked to resign from the Sharp Copier Dealer Advisory Council. I declined to resign, and Sharp subsequently fired me. They then formed a new Council and began holding meetings again. The Guidelines of the Advisory Council do not provide for the unilateral removal of Council members by Sharp. I do not think it is a coincidence that I was terminated after my Senate testimony. Rather, my removal was an act of retaliation for the statements I had made before the U.S. Congress.

The final point I wish to make is to reiterate that current laws simply do not afford office machine dealers a reasonable remedy for the unfair and inequitable treatment we continually receive. The antitrust laws as they have been historically interpreted, and even basic contract law are of no help. In the several situations I have considered suing a manufacturer, my attorney has advised me that such action would be futile. In fact, after my cancellation by Savin, which I will discuss in a minute, I spent over $10,000 on legal research only to be told that I didn't have a case. The Oregon lawsuit against Canon I previously mentioned is another good example. That case resulted in a directed verdict for the defendent solely on the grounds that the Oregon Statute of Frauds barred suit on an oral contract. The judge reluctantly refused to let the case go to the jury, and in open court criticized the defendent for undertaking such inequitable actions. The case was tried only on the contract issues because the plaintiff's lawyers informed him that antitrust grounds were simply not available.

The case of my termination by Savin is another useful example. I was terminated for failure to meet sales quotas, even though the largest impediment to improving Savin sales was Savin itself. I was Savin's service agent for their government sales, which they handled directly, and was therefore obligated to spend large sums for parts and other servicing requirements for which partial reimbursement was due from Savin. Even though they owed me thousands of dollars due to their consistent 3 to 12 months arrearages in payment, they would not continue to provide parts to meet service obligations for existing customers, causing me further expense and hardship. Needless to say, Savin has still refused to buy back my inventory or offer any compensation for the goodwill I have generated. It is interesting to note that very soon after my termination, Savin established a wholly-owned branch operation in my area.

I would be happy to answer any questions that you may have.

Senator HEFLIN. The next panel is Jack Biddle, president, Computer and Communications Industry Association of Arlington, Va., and Roderick Marcoux, vice president, dealer division, Savin Corp., Valhalla, N.Y.

TESTIMONY OF A PANEL CONSISTING OF JACK BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ARLINGTON, VA., AND RODERICK MARCOUX, VICE PRESIDENT, DEALER DIVISION, SAVIN CORP., VALHALLA, N.Y.

Mr. BIDDLE. Mr. Chairman and Senator Exon, I am Jack Biddle, president of the Computer & Communications Industry Association (CCIA). The CCIA represents some 70 leading manufacturers and providers of computers, magnetic storage systems, printers, terminals, data and voice communications equipment and services as well as data processing services. Our member firms range in size from $1 million in annual revenues to well over $1 billion. Together, they generate annual revenues in excess of $5 billion and generate over 100,000 jobs.

The CCIA is 10 years old this month. During those 10 years, we have appeared before this committee more than two dozen times. We have worked diligently for the passage of numerous procompetitive measures, one of the few business groups to do so. We firmly believe in fair dealing, free and open competition among equals and the elimination of restrictions on entry into markets by anyone possessing the requisite skills and resources.

Today, for the first time in those 10 years, I come before you saying, "Wait, this isn't right. This isn't the kind of legislation that will strengthen the American free enterprise system." To the contrary, our analysis leads us to conclude that passage of S. 1256 would lead to further erosion of America's world leadership position in high technology products and bring about the demise of the very office equipment dealers this bill was drafted to protect. If enacted, we believe this bill would overburden our already overloaded courts while ballooning the billings of the legal profession.

The explosive growth of our industry over the past three decades has almost without exception been fueled by small, entrepreneurial companies which have found markets only through the identification of a valid need and the satisfaction of that need through the application of our rapidly expanding capabilities in electronics.

Literally hundreds of companies have come into existence in the past 15 years whose primary trust was to contribute to the desperately needed productivity improvement in the office environment. These firms recognized the impossible market entry barrier represented by the cost of creating their own nationwide sales and service organizations. Many turned to established office equipment dealers. Others helped local entrepreneurs start new businesses to sell and service their products.

As a result of this synergistic relationship, many locally owned and operated dealerships have become extremely profitable, but, even more importantly, the rapid growth that these relationships made possible allowed the manufacturers to achieve economies of scale in production and to invest more money in advanced product research and development.

In many product sectors this has resulted in U.S. manufacturers achieving a position of world leadership.

For example, our member firms export almost 40 percent of their total production. I can safely say that had S. 1256 been enacted into law 10 years ago, none of this would have come about. Thousands of jobs for U.S. citizens would not have been created and our balance of trade problems would be even worse than they are today.

It has been the teamwork between quality dealers and quality manufacturers that has been the source of these benefits and allowed both to grow and prosper.

We believe that S. 1256 would destroy that teamwork to the detriment of all.

Last Wednesday, I read S. 1256 to the chief executive officers of 40 of our member companies who were attending a CCIA meeting in Boston. Thirty-two CEO's indicated that they either currently or in the future intend to market through dealers, all 32 said they cannot or will not do so if S. 1256 in anywhere near its present form is enacted.

Many of CCIA's member companies have expressed alarm over the uncertainties and interference with established manufacturer-dealer business relationships which this bill would create. These relationships, governed by contract, have sufficient stature to be constitutionally protected.

The testimony of those who support this legislation is very compelling. I keep hearing the echo of the voices that for years have been saying, "Let me prosper because it is my right, not because it is the just reward of my endeavors."

I am not suggesting that there are no unprincipled manufacturers in this world, nor do I believe that the drafters of this legislation mean to suggest that there are no unprincipled or incompetent dealers. However, I do ask the members of this committee to examine realistically the issues before you.

A good manufacturer knows that in the American free enterprise system you grow, or you die. This is the ultimate truth in technology-based industries. A good dealer knows that his reputation for integrity and service is the key to success. It is in the self-interest of both manufacturer and dealer to produce, deliver, and maintain a product that generates satisfaction and profit for the manufacturer, the dealer, and the ultimate consumer.

The manufacturer who produces a shoddy product, or who does not stand behind it, will not get or keep quality dealers. His competitor who does, will. The quality dealer also knows that if he builds an organization that achieves his and his supplier's mutual objectives, the manufacturer has little to gain by appointing additional dealers or by opening company-owned outlets.

My point is simply this: Both parties are free to enter into a business arrangement from which both can expect to profit. Neither party has a gun to his head. I have seen no evidence presented to the Commerce Committee or to this committee which indicates that there is anything that limits a dealer's ability to say, "I don't like the way you do business and therefore I will not carry your product." That is the free enterprise system at work and, gentlemen, if it ain't broke, don't fix it.

In my opening remarks, I suggested that is one more lawyers' full employment act. What was to have been a mutually profitable relationship has been turned by an act of Congress into an adversarial one.

Similarly, the bill as now drafted contains numerous terms of art that are ambiguous and which will lead to the generation of enormous new legal fees and innumerable hours of new litigation while further overloading our courts.

The bill has as its foundation no discernible objective standard to prevent its arbitrary and abusive application. Since it will itself invite arbitrary application, it is itself an unfair, inequitable, and unethical expression of government intrusion in business relationships. Virtually any one of the phrases and triable issues set forth above can involve thousands of dollars in pretrial discovery and weeks, if not months, of trial time as experts from both sides seek to convince the court as to the validity of their respective positions.

I would hope that this body, which serves as protector of the judicial process, would want no part in the enactment of legislation that would further increase the litigious nature of our society and further overload our judicial system when the basic relief needed boils down to a simple act on the part of the manufacturer and/or the dealer. If you don't like the deal, put your pen back in your pocket.

Gentlemen, I thank you for the opportunity of appearing before the committee. I would be happy to respond to any questions you may have.

Senator **Heflin**. Mr. Marcoux.

Mr. **Marcoux**. Thank you for the opportunity to appear before your committee.

I would like to tell you about the background of Savin Corp. and give you our overview of the Retail Dealers Agreement Act, and describe our relationships with our dealers.

We are a public corporation, listed and traded on the New York Stock Exchange, and we are a pioneer in office copying. I am the oldest salesman with the corporation. I have been in this business for 19 years, both at the retail and dealer levels.

We, Savin Corp., spearheaded the assault on Xerox's customer base with small inexpensive copiers that gave a lot for the money. These machines were very, very reliable. Until 1976 Xerox had 95 percent of the market, and because of its technology, Xerox literally had a monopoly and dealers and other manufacturers and their dealers could not compete with them.

I think Savin has created competition and opportunities where there were none before. In 1977, there were 15 corporations selling less than 50 models of copiers to retail customers. Today, there are 53 companies offering over 300 individual models to dealers and retail customers. The marketplace is getting very crowded.

Today's market is very, very difficult for both the dealers and for direct manufacturers. In the last year, Addressograph declared bankruptcy and Saxon declared bankruptcy only a few weeks ago. We find ourselves operating in a fiercely competitive industry, with most competitors Japanese and a reawakened Xerox fighting to get back its market share.

In this competitive setting, Savin has invested $150 million in manufacturing plants, which are in the process of final construction in upper New York State. This manufacturing plant will employ over 3,000 people.

In the past 2 years, our revenues have increased, but our profits have substantially decreased. At present, we market to approximately 400 dealers and to 40 branches. In 1974, there were less than 100 Savin dealers in the United States. Today, our sales volume and that of our dealers has increased eightfold.

As Savin has prospered, so have our dealers. Savin dealers are recognized as the best dealers in the industry. This is recognized in many trade journals and articles. Our dealers generally are highly sophisticated businessmen. Some of them are of substantial size, worth from $7 to $40 million, and they render excellent service to their customers.

We have always tried to maintain cordial relationships with our dealers. I think that marketing through dealers is the best way of marketing to our retail end users.

Our dealers are members of the community, of social clubs, they have roots in the community, and they care about their customers. They can, in many instances, provide better service than Xerox or IBM.

We depend on our dealers for local sales and service representation, and we try to maintain an excellent relationship with them. It is in our own best interests to do so. In addition, we are the first company to be able to market major accounts to Government agencies, to State agencies, and to other kinds of markets which dealers were unable to sell to in 1975. We do this through a highly complex national account program.

We have invested millions of dollars in this program, and it allows our dealers for the very first time to compete with Xerox and IBM, and some of these dealers have gone from sales of as little as $800,000 a year to $15 million. Some of our dealers have made as much as $800,000 a month in commissions from State contracts.

Thus, Savin dealers have prospered and Savin has prospered.

Other people before me have spoken in detail about the problems with the proposed bill—but basically I think this bill is going to substantially increase the amount of litigation with dealers. I think it is going to cause me personally, and Savin a tremendous amount of problems in the field because we do business with large national accounts. Although we have very few problems with dealers, when occasionally a dealer does not service a national account properly. In this case it breaks a contract not only with that account locally, but on a national basis. Xerox doesn't have that problem, and IBM doesn't have that problem. None of the people who sell direct to users have that problem. Savin is the only company that has made the investment to put in the field a large network of national account programs. If a single dealer fails to service properly, a cancellation takes place across the country. Due to this unique national account program, the actions of a dealer have an effect beyond that dealer's market. This is different from the past.

Therefore, Savin would oppose any bill that would prevent it from taking remedial treatment to change a dealer when we feel it necessary—if for example, he doesn't pay his bills, if he doesn't sell adequately, or if he doesn't provide maintenance to his customer to a level we want. We think that S. 1256 would severely impact our ability to compete in the marketplace with the major competition, which is Xerox and IBM. We are trying to compete by using our dealers with lines that market direct to customers.

Therefore, I view the proposed bill in the same way that the gentleman on my right sees it; it would be a bonanza for attorneys. I also think it would be a bonanza for economists who would testify as to the economic factors contained in this bill. I have listened to the dealers. I read the transcript from the Commerce Committee's hearing before I came here, Senator. As I said before, we have over 400 dealers. Last year, we stopped doing business with 26 of them. Fourteen of those dealers were terminated because they had internal mismanagement and had put themselves close to bankruptcy. That is, they simply could not pay us what was owed. The remaining 12 dealers were terminated for violations of contracts—for example, inadequate service—or for failure to meet marketing requirements.

If you look at 400 individual relationships which include partnerships, corporations, individuals, with people operating out of their garages to $40 million companies, and with each company having their own goals and directions and their own personal prejudices, I don't think that the facts show us to be a highly predatory company that is destroying the dealers and using them improperly. I don't think the figure of 12 out of 400 is a figure to be ashamed of.

If Congress passes this bill, Savin will be prevented from going into marketplaces and continuing to compete with Xerox and IBM. Many dealers market three or four lines of equipment. You had people testify here, "I had Sharp, Saxon, or Cannon." If a dealer could get an injunction against Savin or some other company, he still has other lines to market. The machines many times are very fungible. I think this bill would present great difficulty to me and my company in marketing through our existing dealer organization.

I will conclude my remarks on the bill's substance here because I think both Assistant Attorney General Baxter, and FTC Commissioner Clanton who have technical knowledge of the proposed bill's shortcomings have made these points very well.

As a company which markets through dealers and branches, and which is committed to doing that, I must point out that Savin has not made a practice of opening retail outlets to compete with existing dealers. In fact, quite the contrary is true. We have spent millions of dollars in putting dealers into their territories. I have built offices for these dealers and have subsidized sales personnel at these dealers to the level of up to $80,000 a year. I have gotten business for the dealers and turned that business over to the dealers under our national account program.

Savin believes that the best way of marketing equipment such as ours in this country is through dealers. We are committed to this. Every single officer in Savin Corp., whether they be in data processing or field engineering, is assigned two dealerships. We select the top 50 dealers in terms of dollar volume for inclusion in this program. Each officer has a commitment that he or she will visit twice a year the dealership at its business site. Once a year that dealer will visit New York and visit the corporate offices. The purpose of the program is to have corporate officers understand the dealers' problems and complaints, and the other side of this is that the dealer learns that we, too, have problems and must meet our quotas. This program will cost $400,000 this year, but we believe that the program is worth that expense and effort.

I will now address the issue of quotas, and talk about how Savin develops its quotas.

We determine at a national level what our revenue goals are going to be for a given year. If we decide that revenues must be increased by a given percentage and if we think this goal is achievable, our financial staff determines what portion of this total is to be accounted for from office equipment (versus paper or supplies). We try to plan a year in advance and make or purchase the proper number of machines. That many machines becomes Savin's sales requirement.

Savin uses the National Office Products Association [NOPA] index and takes the number of machines we intend to sell, and determine the number of white-collar workers in each county in the United States (based on census data). We then take the number of machines intended for sale and take the NOPA index in each county and the number of white-collar workers and multiply. That is how the dealers' quota is determined. The dealer's quota is my quota, since I am responsible for dealer sales.

I don't like quotas, and I am sure the dealers do not, but it is the way we and almost all other companies establish quotas.

Thank you very much.

Senator EXON [presiding]. Thank you, gentlemen, for coming to testify. There has never been a measure before Congress that there are not two sides to. It may well be that people you represent, Mr. Biddle, and Mr. Marcoux, it may be that Savin seeks the ideal situation between a manufacturer supplier and an individual dealer.

Now, I would simply say, though, that the testimony that we have received from the office machine dealers and the organizations they represent raises a question in my mind as to whether or not all manufacturers are carrying out what you both have so eloquently stated as a desire in a relationship.

I would point out that while I would suspect that it could be argued that if your company or the companies that you represent do unfairly treat the dealer, that the dealer has possible recourse through the courts, at his expense.

Gentlemen, thank you very much. Your testimomy was interesting and to the point, and we appreciate your attempt to conserve time.

Thank you very much.

[The prepared statements of Messrs. Biddle and Marcoux follow:]

PREPARED STATEMENT OF A. G. W. BIDDLE

Good morning, Mr. Chairman and Members of the Committee. I am A.G.W. Biddle, President of the Computer & Communications Industry Association (CCIA). The CCIA represents some 70 leading manufacturers and providers of computers, magnetic storage systems, printers, terminals, data and voice communications equipment and services as well as data processing services. Our member firms range in size from under one million dollars in annual revenues to well over a billion dollars. Together they generate annual revenues in excess of $5 billion and generate over 100 thousand jobs.

The CCIA is 10 years old this month. During those ten years we have appeared before this Committee more than two dozen times. In each instance it has been in support of legislation that would improve and modernize our antitrust laws and their enforcement and to seek improvement in the competitive conditions faced by the smaller companies in our industry. We worked diligently for the passage of the Tunney Act, the Hart, Scott, Rodino Act, the Antitrust Improvements Act of 1981, and numerous other pro-competitive measures -- one of the few business groups to do so. We firmly believe in fair dealing, free and open competition among equals and the elimination of restrictions on entry into markets by anyone possessing the requisite skills and resources.

Today, for the first time in those ten years, I come before you saying: "Wait, this isn't right. This isn't the kind of legislation that will strengthen the American free enterprise system". To the contrary, our analysis leads us to conclude that passage of S.1256 would lead to further erosion of America's world leadership position in high technology products and bring about the demise of the very office equipment dealers that it was drafted to protect. Moreover, if enacted, we believe this bill would further burden our already overloaded courts while ballooning the billings of the legal profession. Let me expand briefly on each of these statements.

The explosive growth in our industry in the past three decades has almost without exception been fueled by small, entrepreneurial companies which have found markets only through the identification of a valid need and the satisfying of that need through the application of our rapidly expanding capabilities in electronics. Literally hundreds of companies have come into existence in the past 15 years whose primary trust was to contribute to desperately needed productivity improvement in the office environment. Companies like CPT, Lanier, Lexitron, NBI in the word processing field; Basic Four, Wang, MDS, Qantel, Harris, Perkin-Elmer, Hewlett Packard, Datapoint in minicomputers and the even more recent phenomenon of the entry of Apple, Commodore, Tandy, Atari, and others into the microcomputer field. In almost every instance, these firms recognized he impossible market entry barrier represented by the cost of creating their own nationwide sales and service organizations. Many turned to established office equipment dealers; others helped local entrepreneurs start new businesses to sell and service their products.

As a result of this synergistic relationship many, many locally owned and operated dealerships have become extremely profitable -- but, even more importantly, the rapid growth that these relationships made possible allowed the manufacturers to achieve economies of scale in production and to invest more money in advanced product research and development. In many product sectors this has resulted in U.S. manufacturers achieving a position of world leadership. The last time we collected export data, for example, our member firms were exporting almost 40% of their production. I believe that I can safely say that had S.1256 been enacted into law 10 years ago, none of this would have come about. Thousands of jobs for U.S. citizens would not have been created, and our balance of trade problems would be even worse than they are today. It has been the teamwork between quality dealers and quality manufacturers that has been the source of these benefits and allowed both to grow and prosper.

We believe that S.1256 would destroy that teamwork to the detriment of all. It is our judgment that the Office Machinery and Equipment

Dealers' Agreement Act is unnecessary and imprudent legislation. There has been no substantial showing that the public interest would be served by legislation of this kind.

Last Wednesday, I read S.1256 to the Chief Executive Officers of 40 of our member companies who were attending a CCIA meeting in Boston. Of the 32 present who indicated that they either currently or in the future intend to market through dealers, 32 said they cannot or will not do so if S.1256 in anywhere near its present form is enacted.

Many of CCIA's member companies have expressed alarm over the uncertainties and interference with established manufacturer-dealer business relationships which this Bill would create. These relationships, governed by contract, have sufficient stature to be constitutionally protected.

Article I, Section 10, of the United States Constitution states that no State shall pass any law impairing the obligation of contracts. While this would be an Act of the United States, the legislation counters the spirit of the Constitution which protects the sanctity of contracts. There is no evidence that the contract process upon which United States commercial enterprise is based need be replaced by the pervasive government and judicial regulation which this legislation would impose.

Furthermore, enactment of S. 1256 would upset statutes in the 49 of the 50 states which have adopted the Uniform Commercial Code - a viable set of ground rules governing the very relationships that this bill seeks to modify. Does this committee wish to effectively repeal 49 state statutes to provide an "out" for a dealer who is simply unwilling to tell a manufacturer that "I do not wish to carry your product line unless ---"?

I have read the testimony of those who support passage of this legislation. It is very compelling, but disquieting. I kept hearing the echo of the voices that for years have been saying "let me prosper because it is my right, not because it is the just reward of my endeavors."

I am not suggesting that there are no unprincipled manufacturers in this world, nor do I believe that the drafters of this legislation mean to suggest that there are no unprincipled or incompetent dealers. However, I do ask the members of this Committee to examine realistically the issues before you.

A good manufacturer knows that in the American free enterprise system you grow - or you die. This is the ultimate truth in technology-based industries. A good dealer knows that his reputation for integrity and service is the key to success. It is in the self interest of both manufacturer and dealer to produce, deliver and maintain a product that generates satisfaction and profit for the manufacturer, the dealer and the ultimate consumer.

The manufacturer who produces a shoddy product, or who doesn't stand behind it, will not get or keep quality dealers. His competitor who does, will. The quality dealer knows that his supplier must gain market share if he is to remain competitive in terms of product and price. That dealer also knows that if he builds an organization that achieves his and his supplier's mutual objectives, the manufacturer has little to gain by appointing additional dealers or by opening company-owned outlets. On the other hand, if a dealer fails, or refuses, to build an organization that can exploit the field market potential of the product, why should the manufacturer's opportunities be foreclosed?

My point is simply this: both parties are free to enter into a business arrangement from which both can expect to profit; neither party has a gun to his head. If dealer X doesn't like the relationship proposed by manufacturer A, he can and should seek relationships with manufacturers B, C, or D. If other dealers feel the same way about manufacturer "A," he will soon be out of business. If other dealers feel differently, and prosper in their relationship with manufacturer "A," we should question the business acumen of dealer X.

I have seen no evidence presented to the Commerce Committee or to this Committee which indicates that there is anything that limits a dealer's ability to say "I don't like the way you do business and, therefore, I will not carry your product". That's the free enterprise system at work, and, Gentlemen, "if it ain't broke don't fix it". With all due respect for an impressive special interest lobbying effort, I suggest that it "ain't broke."

In my opening remarks, I suggested that this is one more "lawyers full employment act". Section 6 of the bill not only prohibits a supplier from denying the dealer the right to be accompanied by counsel -- it virtually mandates that any time a suppliers representative calls on a dealer - even if it is to discuss a new product or promotion, he too must be accompanied by counsel. Suddenly what was to have been a mutually profitable relationship has been turned by an act of Congress into an adversarial one.

Similarly, the bill as now drafted contains numerous terms of art that are ambiguous and which will lead to the generation of enormous new legal fees and inumerable hours of new litigation while further overloading our courts. Examples include:

Sec. 2(2)	"...for use in an office environment:"
Sec. 2(3)	"dealer agreement means any written or oral agreement
Sec. 2(8)	"good faith"....
Sec. 3(a)(2)	"furnish...on a timely basis;"
Sec. 3(a)(3)	"to fail to act in good faith...."
Sec. 3(3)	"...the court shall determine whether the decision of such a supplier was arbitrary".
Sec. 3(3)(A)	requires the court to establish "current economic and marketing conditions"
(B)	"the impact on competition.."
	"...the extent to which the public

interest would be served..."

(D) "whether the investment and obligation [of the dealer] would be diminished...?

(E) "the permanency of an investment [by the dealer]

Sec. 4(a) "...fair and reasonable compensation for the value of the dealer agreement...including a reasonable amount for goodwill".

Sec. 8 "...or in the exercise of reasonable care should have discovered,..."

* Emphasis Added

Other terms in S. 1256 are equally troubling. The basic "good faith" standard upon which the bill is based is seriously flawed. The Act depends heavily on this term and, in so doing, fails as an absurd attempt to legislate the connundrums of human behavior and relationships. In addition, the Act would be constitutionally void for vagueness. "Good faith," as defined in this legislation, by the terms "fair," "equitable," and "ethical" is not a legally sufficient standard. Thus, the bill has as its foundation no discernable objective standard to prevent its arbitrary and abusive application. Since it will itself invite arbitrary application, it is itself an unfair, unequitable, and unethical expression of government intrusion in business relationships.

Further, the substance of Section (3)(a)(1) already exists for a dealer's protection, by virtue of the ability of any party to void a contract entered into on the basis of fraud. Virtually any one of the phrases and triable issues set forth above can involve thousands of dollars in pretrial discovery and weeks, if not months, of trial time as experts from both sides seek to convince the court as to the validity of their respective positions.

I would hope that this body, which serves as protector of the judicial process, would want no part in the enactment of legislation that would further increase the litigious nature of our society and further overload our judicial system when the basic relief needed boils down to a simple act on the part of the manufacturer and/or the dealer. If you don't like the deal - put your pen back in your pocket!!

We also question whether this Act is not in fact inconsistent with federal regulations and antitrust laws to the extent that territorial restraints arguably are no longer imposed unilaterally by the supplier, or are imposed uniformly under the Act for any size business regardless of market share or the reasonableness of such restraint. In addition, requirements forcing consultation between manufacturers and dealers are inconsistent with the antitrust laws. For example, such a consultation may possibly be an unlawful combination under those laws.

CCIA's member companies are opposed to the Bill as it would require separate agreements for each separate product sold by a company's dealer representatives. This requirement is not only unmanageable, it is inconsistent with the needs of business, and will simply add to the costs and complexity of doing business. The clause in Section 3 which provides for additional unearned compensation at the end of a dealer agreement is simply a windfall to dealers, adding to the costs of doing business and increasing product prices. It also creates an undefined "contingent liability" on the books of the manufacturer that can be avoided only by refusing to market through dealers.

The provision in the Act which would grant exclusive territories to each dealer of over 125 miles is also inconsistent with this nation's abhorrence of monopolies. Entrenched dealers will not have any incentive to keep prices low and services at a high level.

The net effect of S. 1256 is to guarantee that no supplier can make changes which affect a dealer or his territory without being tied up in court.

Dealers who prefer an exclusive sales environment have as an option manufacturers/distributors who provide that kind of protection. Those who choose the non-exclusive environment should be willing to live within the context for which they bargained, enjoying the benefits of the unrestrained market in which they do business.

Speaking for myself, and for CCIA's 70 member companies, The Office Machinery and Equipment Dealers Agreement Act is unnecessary and unworkable. We urge the Committee to reject this legislation.

PREPARED STATEMENT OF RODERICK D. MARCOUX

My name is Roderick Marcoux, I am Vice President, Dealer Division of Savin Corporation, Valhalla, New York. I appreciate the opportunity to testify on S.1256 - the Retail Dealers Agreement Act. This morning I would like to provide the Committee with a brief background of Savin Corporation, Savin's comments regarding this bill, and a brief description of Savin's relationship with its dealers.

BACKGROUND OF SAVIN CORPORATION

Savin Corporation is a publicly held corporation whose stock is traded on the New York Stock Exchange and all other major United States Stock Exchanges. Savin has been a pioneer in the office copying industry. Prior to 1976, Xerox Corporation held a monopoly in the office copying industry, but Savin's introduction of inexpensive, reliable copying machines created competition in this industry. With the creation of competition, new opportunities have been created for numerous copier manufacturers, and for dealers throughout the United States. Today, Savin finds itself operating in a fiercely competitive industry, in a difficult economy, at the same time that it is establishing a major new manufacturing facility in the United States which will employ over 3,000 workers. In the past two years, total revenues have increased, but profitability has declined.

At the present time Savin has over 400 dealer locations throughout the United States. In 1976, the company had less than 100 dealer locations. Savin has always strived to maintain excellent relations with its dealers, and as I will discuss in greater detail below, I believe we have achieved this goal. Maintaining excellent dealer relations is good business for Savin, and for all copy equipment manufacturers as well. Dealers are major customers of all manufacturers - for both the machines themselves and for supplies such as paper, toner and spare parts. For this reason, as well as for the need for local sales and service representation, excellent dealer relations are in the manufacturers' best interests.

COMMENTS ON S.1256

Savin could support reasonable legislation affecting the rights of dealers and manufacturers. However, Savin cannot support S.1256 since it contains provisions which would make it virtually impossible to supplement marketing while there is any dispute with an existing dealer. This bill would provide existing dealers with what amounts to a veto power over the decision to add new dealers to an area. In addition, there are problems with the definition of good faith, the market territory limits, the termination provisions, as well as several other portions of the proposed bill.

Savin believes that one of the fundamental problems with this bill lies in Sections 3(b) and 4(b), the injunctive relief sections, which would enable an existing dealer to prevent a manufacturer from terminating him or adding a new dealer. I would like to briefly discuss several of the numerous problems with these provisions.

The first major problem arises in a situation where there is a dealer who is not performing in accordance with its agreement. In this case, it will be almost impossible for the manufacturer to remedy the problem and improve its marketing position due to the existing dealer's ability to enjoin the terminatio of existing agreements and to enjoin the placement of a new dealer in the area. A dealer with whom the manufacturer has a dispute and who is threatened with termination, cannot be expected to actively market the manufacturer's products if termination is threatened. By providing automatic injunctive relief upon the filing of a dealer's action regarding termination, under Section 4(b), and by enabling the dealer to seek an injunction against the placing a new dealer pursuant to Section 3(b), the manufacturer will lose its marketing ability for the duration of the litigation. Further, because of the threat of possible litigation against a new dealer, it is unlikely that a manufacturer will be able to reach a final agreement with an individual willing to provide improved marketing in an area. Thus, these sections would freeze in place marginal dealers, and would adversely affect the ability of the manufacturer to aggressively market its products.

Experience with state motor vehicle franchise statutes which contain similar injunctive relief provisions has shown that these laws are contrary to the public interest. Indeed, the highest court in two states (Nevada and Georgia) have declared that such statutes violate their state constitutions because, among other things, they are anticompetitive and, through the guise of injunctive relief, require the courts to perform a non-judicial, licensing function. Furthermore, these state laws have subjected motor vehicle franchisors to delays of up to four years while state agencies and courts have decided whether an inadequate dealer could be terminated. This has occurred even though the state legislatures unquestionably intended for the laws to permit the swift termination of such dealerships. As a result of these delays, the manufacturers have been unable to provide adequate sales and service.

The second major problem caused by the injunctive relief provisions of the proposed bill relates to the difficulty a manufacturer will have in placing new dealers in a rapidly expanding market area. In areas of high economic growth, a manufacturer often needs to broaden its existing dealer base in order to expand with the market and to provide adequate servicing to new customers. The threat of injunctive relief by an existing dealer who may not be adequately equipped to serve an expanded market, but who is unwilling to give up the potential market, will severely inhibit a manufacturer in its efforts to obtain new dealers in the area. The reason for this is that a potential dealer is likely to be joined in any action against a manufacturer brought by the existing dealer under Section 3(b). No businessman likes the idea of buying into a law suit.

The state laws providing for injunctive relief in favor of an existing motor vehicle dealer to prevent the establishment of an additional dealer have harmed both dealers and manufacturers. In one case, even though the state trial and appellate courts held that there was good cause to establish the new dealer, by the time the appellate process was exhausted (over two years), the proposed dealer was no longer able to establish the dealership. In this case, both the proposed dealer and the manufacturer suffered as a result of these state laws. Indeed, the legislature in one state (Arizona) is considering repealing this type of legislation.

The third major problem arising from the injunctive relief provisions in the proposed bill is that a manufacturer will face significant problems in obtaining new dealers for different product lines. Section 3(a) uses the term "same product", and if Savin were to introduce a totally new line of copying machines aimed at a different segment of the market, existing dealers could claim that this new machine is the same product as what they are marketing. The existing dealer could then claim that notification under Section 3(a)(4) is required, and could utilize the injunctive relief provisions of Section 3(b) to attempt to enjoin the manufacturer from establishing new dealers who are experienced in marketing and servicing this new type of machine. To limit a manufacturer's ability to establish new dealers for new products places unreasonable burdens on the manufacturer.

While Savin believes that the injunctive relief provisions of the proposed bill are overly burdensome and should not be adopted; at a minimum, the Committee should define what is meant by the term "same product" in Section 3(a)(4) so as to avoid a situation such as the one described.

In addition to the injunctive relief provision contained in Section 3(b), Section 3 also contains several other major flaws which would create hardships for manufacturers and dealers alike. Section 3(b)(1) is ambiguous as to when the required 60 day notification period begins to run. It is unclear whether this 60 day period begins when the manufacturer institutes termination procedures, or whether the time period commences when the manufacturer provides actual notice of termination.

In the case of Savin, the company works with the dealer in an attempt to remedy any problems which the dealer may be experiencing. Savin does this over a period that normally covers approximately 90 days. If the problem cannot be resolved, a termination letter is sent, and Savin then re-purchases the new and unused inventory from the dealer. If Savin were forced to provide 60 days additional notification after attempting to remedy the problem with the dealer, the process leading to termination could last approximately 150 days. This is an extremely long period of time for a manufacturer to attempt to remedy difficulties with any dealer. If the proposed bill is read to require the 60 day notification period to begin after Savin has concluded its attempts to work with the dealer, it is likely that Savin will be forced to modify its existing procedure so as to begin termination procedures earlier than is now the case. Enactment of the proposed bill is therefore, likely to result in less time for the dealer and the manufacturer to remedy the problems that the dealer is having in meeting its obligations under the agreement.

An additional problem with Section 3(b) is the failure to specify the criteria that a court should apply in considering whether to grant the injunction. The proposed bill is silent as to whether all the factors listed in sub-paragraphs (A) through (H) must be met, whether some of these factors must be met, or whether the court is to balance these factors in making its determination to grant or deny the injunction. In addition to this ambiguity in the language of the proposed bill, the factors specified in the proposed bill are likely to result in lengthy, complex litigation that would serve only the purposes of lawyers, accountants and economists, rather than the interests of dealers and manufacturers. I would urge this Committee to re-examine the language contained in these sub-paragraphs in order to clarify the legal requirements for granting or denying an injuction. In addition, the Committee should simplify the criteria so that lengthy, complex, litigation will not result.

Section 3(a)(3) requires a supplier to "act in good faith in terminating, canceling, or refusing to renew any dealer agreement" (emphasis added). This is the only provision in the proposed bill which mentions a dealer's right to continue the dealer agreement beyond its stated expiration date. Section 4(a), concerning termination or cancellation of a dealer agreement, provides that Section 4 does not restrict the supplier from "the orderly termination of a contract according to a specified termination date contained in such contract". Obviously, this reference in Section 4 provides no comfort in view of the language in Section 3(a)(3). Therefore, the phrase "or refusing to renew" in Section (3)(a)(3) should be deleted in order that the dealer agreement can stand squarely on its own terms. A manufacturer should not be required to enter into what could be, because of this proposed bill, a perpetual agreement despite the fact that the parties agreed on a specific termination date.

The second major criticism of the bill as drafted relates to the definition of "good faith" contained in Section 2(5). This definition is seriously flawed in that it is not precise, nor is there any indication of the body of case law that will interpret this definition. Due to the appearance of this term in Sections 3(a)(2) and (3) it would become almost impossible to have a discussion between representatives of a manufacturer and dealer regarding the dealer's shortcomings under the agreement without the threat of the dealer claiming that the manufacturer's representative violated Section 3(a)(2) or (3). Savin suggests that the better definition of good faith is that found in the Auto Dealers Day in Court Act (15 U.S.C. §§1221-1225). This definition is quite similar to that contained in the proposed bill; however, it contains an additional clause which allows reasonable discussion and negotiation between the contracting parties.

Another fundamental problem with this bill is in the territorial coverage contained in the definition of "market area" in Section 2(7). At the present time, all of Savin's agreements with dealers deliniate a territory. However, if the proposed bill is adopted, the twenty mile area contained in sub-paragraph (B) of this definition will defacto become the rule, assuming, of course, that any new dealer agreements can be made because of the injunctive relief provisions in Section 3(b). As a result of this 20 mile zone, a new dealer for a new product line may be able to establish an area which would include the entire island of Manhattan as well as major portions of Westchester County, suburban New Jersey and Connecticut. Thus, no additional dealers could be established in any of these areas. In the Metropolitan Washington, D.C. area, a dealer locating in downtown Washington would be able to have as a market area, the entire District of Columbia, as well as major portions of suburban Maryland and Virginia. A similar result would occur in virtually every major city in the United States. Such a result would be impossible for a manufacturer, would decrease competition, and is likely to lead to higher prices for the end users. In addition, the balance sheets of 95% of existing dealers would not allow credit lines large enough to purchase enough equipment to satisfy the market potential in major cities.

The existence of this twenty mile zone coupled with the language in Section 11 of this proposed bill make it difficult for a manufacturer to negotiate an area less than the twenty miles contained in Section 2(7)(B). This is due to the language of Section 11 which may provide the dealer with an argument in any subsequent litigation that the manufacturer required the dealer to waive compliance with the provisions of this act. Under the terms of Section 11, such a waiver would be void. Thus, the dealer would be able to claim, notwithstanding the market area specified in the agreement, that the actual market area should be 20 miles.

The final major problem with the proposed bill arises from the termination provision contained in Section 4(b). This Section provides that the dealer must be compensated for "good will". The proposed bill does not contain a definition of this term. But more fundamental than this problem, is the fact that virtually all good will created is a result of the action of the manufacturer, not the dealer. The manufacturer creates good will first by producing a reliable product, and then by the manufacturer's advertising activities, both nationally and in a particular market area. It should also be noted that a dealer who fails to live up to his agreement with the manufacturer, may actually damage the manufacturer's name in a particular area and may cause a loss of good will with respect to the manufacturer. Further, many dealers are multi-line dealers, that is they sell and service copy machines for several manufacturers and therefore owe no allegiance to any single manufacturer. For these reasons, I would urge the Committee first to re-examine the concept of whether a compensation for good will should be included in the proposed bill; and second, if the Committee should decide to retain this concept, that a precise definition and criteria for establishing good will should be contained in the bill.

SAVIN'S RELATIONSHIP WITH ITS DEALERS

Today Savin markets through 40 direct offices and over 400 dealerships. Savin has a special relationship with these dealerships. They invest in Savin's name and share our corporate identity. In many cases, our line of copiers is the only one carried by a dealer or is the mainstay and foundation of a dealer's business.

Because of the length of time Savin has had a relationship with many of these dealers, personal relationships have been developed. In fact, I have just returned from a four-day fishing trip in Lake of the Ozarks with our largest dealer, Modern Business Systems. MBS has sales in excess of $40,000,000 and has been a dealer for Savin for sixteen years. I know the owners, their wives and their children and at least twice a year, I am a guest at their home. It should also be noted that many of our dealers are former Savin employees, and in some cases, Savin's dealers have come back to work for the corporation.

In addition to the effort that I and other Savin executives exert to make Savin dealers part of our family, Savin also supports its dealers in the field. Savin has sixty people assigned to dealer areas who train the dealers' sales personnel and field engineers. Also, we provide specialized on-site sales assistance in marketing to the federal government, state governments and other major accounts. I might add that Savin is the only copy machine company well entrenched in the major accounts market that utilizes dealers. The March, 1982 issue of Nielsen Dataquest Research Newsletter states:

> "Xerox, Savin, IBM, and Kodak are well entrenched in the major account market. The large user is familiar with their names and reputations and knows that their sales and service networks are extensive and in place. 3M, Royal, and Saxon have traditionally relied more heavily on their branch operations for major account marketing. The only notable exception is Savin, whose dealers participate heavily in the major accounts program."

In other words, Savin has a record of working hand in hand with dealer principals in the marketing to major accounts and Savin and its dealers have equitably shared in the revenues derived from these accounts. This demonstrates that the support we provide Savin's dealers enables them to go head to head with major competition such as IBM and Xerox, and still prevail in the marketplace.

Further evidence of the close relationship Savin has with the dealers and the marketing support that is given to them is evidenced in Office Product Analyst - a monthly newsletter devoted to the cost performance analysis of office products. In September, 1981 this publication asked dealers to rate their suppliers in terms of support. Over all, Savin was given the highest rating compared to any other manufacturer of photocopying distributed through dealers.

Despite what I view as generally an excellent relationship with our dealers, it is obvious that when a company is doing business with over 400 separate dealerships, occassionally misunderstandings occur and disputes arise. Because of the complex relationship Savin has with its dealers, particularly with respect to rental machines, disputes arise from account billing for rental machines placed in dealer territories (of which the dealer receives 43% of the revenue).

There are three reasons why Savin would terminate a dealership:

1. a failure to meet his financial obligations;

2. an inability to meet his sales quota or inadequate service of the products;
3. the re-distribution of product on a wholesale basis to the end user.

During calendar year 1981 and through May, 1982, Savin terminated twenty six dealers. Twelve of these terminations were based upon an inability to fulfill their obligations to Savin regarding their financial responsibilities. The remaining fourteen dealers were terminated either for poor marketing performance or contract violations.

The last point I would like to cover is how we develop and assign quotas to our dealers. Savin uses the NOPA Index which is a commonly used reference to market potential. The index consists of the number of white collar workers in each county in the U.S. Each county is given a percentage of the total number of machines which we market in the U.S. during a fiscal year. If a dealer is exclusive in the assigned territory, he is given the entire responsibility for meeting this quota. If a county is shared by more than one dealer, then the quota is split between the two dealers. There are some adjustments made to this index to take into consideration local conditions. An example would be the Detroit area, where due to the depressed state of the auto industry, we do not expect the dealer to do as well as dealers in the area around an economically growing area such as Houston, Texas.

CONCLUSION

Savin believes that the proposed bill would radically alter existing business arrangements between itself and its dealers, and that several of the major provisions of the proposed bill would produce adverse consequences for both Savin and its dealers for the reasons stated above. For these reasons, Savin believes that this proposed bill should not be enacted.

Senator EXON. The next panel is Steve Channer, executive director, Business and Institutional Furniture Manufacturer's Association, Grand Rapids, Mich.; Thatcher W. Rea, Jr., president Mueller Furniture Corp., Grand Rapids, Mich.; and Thomas Pratt, group vice president, Herman Miller, Inc., Zeeland, Mich.

TESTIMONY OF STEVE CHANNER, EXECUTIVE DIRECTOR, BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION, GRAND RAPIDS; THATCHER W. REA, JR., PRESIDENT, MUELLER FURNITURE CORP., GRAND RAPIDS, AND THOMAS PRATT, GROUP VICE PRESIDENT, HERMAN MILLER, INC., ZEELAND, MICH.

Mr. CHANNER. Good morning.

Senator EXON. Welcome to you people from Michigan, generally recognized as the furniture capital of America.

Mr. CHANNER. Thank you.

My name is Steve Channer. I am the executive director of the Business and Institutional Furniture Manufacturer's Association located in Grand Rapids. We are a national trade association representing approximately 90 percent of the sales volume of our industry, and our membership is national in scope.

In other words, Senator, all our manufacturers are American manufacturers.

Our testimony this morning is against proposed S. 1256, and in addition to my remarks you will hear testimony from two of our members who manufacture office furniture.

First of all, I would like to state that the reason that our industry did not testify at the Senate Commerce Committee hearing on October 29 of last year was because we really did not understand the implications of this proposed bill. From what we had heard and read up until that time, we were led to believe that some concern existed between the office machine dealers and some foreign office machine manufacturers. Basically, we did not understand the broader implications of the proposed bill.

Since that date, however, we have become very concerned because it has been brought to our attention that the bill goes far beyond its original intent. Our attorneys advise us that the section dealing with product could clearly include office furniture used in any business environment, which by definition is a very broad area, and since no mention is made of foreign manufacturers we certainly feel involved.

If indeed office machine dealers are finding difficulty in dealing with foreign office machine manufacturers, we feel that they should settle their differences without involving manufacturers and dealers of all other business products. As an example, our industry works very well with its dealers under our present laws. As a matter of fact, our industry is committed to selling its product through the existing dealer network.

At the present time it is true that in some cases more than one dealer in a given area handles the products of a particular manufacturer. It is also true that in some cases a particular dealer will handle competitive lines within his dealership. These are examples of give and take situations that have been existing for years, and although not always ideal are nonetheless in existence through mutual consent. Most importantly, both examples promote competition and free trade which is certainly to the advantage of the ultimate consumer.

Proposed S. 1256 in our opinion establishes guidelines that are one-sided in favor of the dealer and against the manufacturer. Current laws provide protection for both parties, and the negotiation level for representation is very much on balance. Proposed S. 1256 would disrupt this balance to a place where it may not be feasible for office furniture manufacturers to sell through dealers. If this indeed happened, the provisions of the bill would be self-defeating for the purposes intended. We feel that the bill also provides many areas for opinion which could lead to very expensive civil actions, and since many of our manufacturing members are small, and in some cases smaller than the dealers that represent them, they would be hard pressed to finance a suitable defense.

Thank you for your attention and consideration.

I would like to now turn the microphone over to Thatcher Rea, of Mueller Furniture Corp. of Grand Rapids.

Senator EXON. Thank you.

Mr. Rea.

Mr. REA. Mr. Chairman, Mueller Furniture Corp. is a small, privately held company which manufactures office furniture and sells throughout the United States. Although the company has grown significantly over the past 7 years, it is still considered small and commands under 2 percent of the market.

Whereas the major manufacturers of office furniture have developed well-established dealer networks through which their products are sold, it is difficult for a small manufacturer who is, in many cases, smaller than the dealer, to command the attention of the dealer body within the United States and to gain the kinds of support necessary to make the company grow solely through dealers' sales. Consequently a company such as ours which makes high-line executive office seating, tables, and case goods depends heavily upon interior designers to specify our products for new and refurbished installations and does not depend to any great extent upon the dealer salesperson to recommend a Mueller chair to a client.

However, once the end user has agreed to accept the interior designer's recommendation, the job is usually put out to bid to a number of competing dealers. These dealers may or may not be active Mueller supporters, but in any case those dealers who are asked to bid are all quoted the same price by the manufacturer. The decision on selection of the purchasing dealer rests with the end user and the interior designer. Once the dealer has been notified of his selection, he then places his order with the manufacturer. It is apparent that in this case the dealer has had relatively little to do with obtaining an order for Mueller, but that dealer stands to share in the benefits by commanding the maximum discount available just to order, receive, and install the furniture.

There is a limited number of competent dealers available in all of the markets who are capable and willing to support all of the qualified manufacturers who seek their attention. Therefore, it is necessary for the smaller manufacturer to seek other routes in order to sell his products. This has given rise to direct sales by the manufacturers to the end-user through installation services, and to the establishment of new, smaller dealers in major markets who specialize in nonmajor brands. Consequently, the competitive process of the American economy is alive and well in the office furniture industry which is evolving new methods of distribution to meet a growing market.

Now, let's look at what the small manufacturer actually faces in trying to do business with established dealers in certain markets. In order to maintain the relationship with those manufacturers with whom they do the greatest volume, the limited number of dealers in a market become closely allied with certain manufacturers and endeavor to promote their products. The small number of "good" dealers in a market and the large number of manufacturers wanting the dealer's support should cause the laws of supply and demand to prevail, bringing about a growth in both established and new dealers. However, this is not always the case. Sometimes the dealer agrees to take on the line of the small manufacturer with promises of performance only to do nothing with it through generation of no sales or substitution of a competitive product, but still be in a position to bid on jobs which the manufacturer's representative has really sold.

This is referred to as "sitting on the line," and eventually leads to the manufacturer's need to change dealers. On the other hand the small manufacturer may approach all of the dealers in a market area and be unable to obtain a commitment from any of them. They would all like to have the line, but many times without quotas, floor display, stock, or any other investment. In that case, the small manufacturer has no alternative but to sell all dealers in the market area, making the product known as "an open line." He hopes that one or two will eventually take enough interest in the manufacturer's products to make some commitment, and thereby encourage the small manufacturer to make a comparable commitment to the dealer or dealers by limiting the distribution in that market. Again, this is the natural American economic process at work.

The purpose in explaining how this process actually operates is to try to make you aware that the passage of law which would provide greater protection to the dealer may at the same time impose penalties upon certain manufacturers who are unable to exert any clout with the dealers under the present system today and may limit the ability of the end user to get the best value available by not having access to all sources of supply. It is not hard to imagine where Mueller would be today had we had to depend only upon dealer support to penetrate a very competitive market.

We recently had a good example of how the system ought to work. Mueller had an exclusive dealer in a major market who displayed our product but whose sales volume failed to approximate the rate of growth of our company as a whole or the industry growth within the market. As an exclusive dealer, every Mueller sale in the market went through him, whether he generated the business or not. Designers complained to our representative that they could not receive a competitive quote for their clients, so they chose other products from other manufacturers where there were multiple dealers.

We reviewed the dealer's performance with him and the problems we were having, but no signs of improvement were forthcoming. At the same time the dealer was quietly disposing of his floor samples. We confronted the dealer again and announced that we were going to open up some smaller dealers in town to expand our sales base and provide multiple sources for designers. Despite a warning of a decline in business, which he gave us, our business with that dealer and within the market as a whole has now started to increase. That is free enterprise in action, and it wasn't necessary to pass a law to make it work, either.

As a small furniture manufacturer, there are no laws proposed which will require the dealer to sell my products, even though he may say that he will do so. Therefore, there should be no laws which restrict my ability to change dealers in the event he does not perform. It would be hoped that in the event of a problem, both sides can get together and resolve it while still maintaining a strong manufacturer-dealer relationship, and this actually happens in most cases. However, free trade should prevail.

The manufacturer has an obligation to the dealer to present him with good products, to provide technical assistance where required, to stand behind the product in the case of a defect and to provide a discount sufficient to allow the dealer a suitable operating margin. In turn, the manufacturer expects the dealer to promote the sale of his products, install them and provide follow-up service where required. As there are certainly suitable substitutes for all of the dealer functions, the enactment of this legislation will only encourage the manufacturers, particularly the smaller ones without strong dealer support, to seek other sources of distribution.

Thank you, sir.

Senator EXON. Thank you.

Mr. Pratt?

Mr. PRATT. Thank you, Senator Exon.

I am grateful for the opportunity to represent Herman Miller. We are a publicly held company engaged primarily in the manufacture of furniture systems, products, and related services principally for offices and, to a lesser extent, for health care facilities and other uses.

We are headquartered in Zeeland, Mich. We had operations in several places in this country. We are in sales and marketing efforts in every major area in this country.

We have had a fair amount of success and especially in working with dealers, and we have a very strong dealer network and consider that to be a key link between us and our customers.

We are concerned about the intent you state for this bill, especially as it relates to foreign concerns, and we agree steps must be taken to protect U.S. business. We feel these steps, no matter how small, must be well grounded and carefully examined, and must be in the long term interest of doing business right here in our own economy.

We believe any short term exclusionary legislation that may have negative long-term effects would impair the ability of all of us to succeed and we caution you and others that any legislation moving toward action in Congress that restricts the business process for one group in relation to another can have long-term negative effects.

We believe S. 1256 is a single-issue bill, and is aimed at manufacturing and dealer relationships within a particular market with the intent to protect U.S. dealers from the abuses of foreign manufacturers.

This bill, however, ignores the possible greater concerns and effects that it will have to U.S. manufacturers and dealers, and end users as well as other small business. Herman Miller believes this legislation is antithetical to the free market concept. It has the effect, if not the purpose, of shielding businesses from the forces of competition. It restricts the manufacturer's ability to expand the number of dealers for its products and clogs both interbrand competition and intrabrand competition because:

One, the manufacturer's ability to compete strategically against other brands will be significantly curtailed. Two, the consumer's ability to obtain a particular brand at the best price and with the best service will be significantly curtailed.

Laws which protect businesses from competition by interfering with the natural forces of a free market are necessarily anticonsumer in their effect.

We believe this legislation may ultimately work to the disadvantage of dealers. Manufacturers, we think, will be encouraged, if not forced, to forward integration in order to recapture the flexibility in product distribution and marketing which is necessary in this dynamic competitive world. For example, manufacturers would be encouraged to sell through company-owned outlets or stores rather than independent dealers. The example of IBM, which several brought up, will not go unnoticed.

We agree, after reading the testimony that came out of the Commerce Committee hearings, that something may need to be done to prohibit foreign companies from crippling U.S. dealers through unconscionable behavior. However, we question whether this proposed legislation would remedy that problem. The legislation could impair the manufacturer's ability to modify its business plans and arrangements to meet changing conditions of the market, or to accommodate special needs with respect to new product innovations.

The bill does not take this into account, and does not take into account the following: Either the changing in market methods made by existing competitors, or the introduction of new competitors which sometimes requires the manufacturer to offset the marketing and/or distribution methods to meet that competitive challenge; sometimes dealers take on competitive product lines and/or emphasize the sale of competitive product lines to the detriment of the manufacturer; the introduction of a new product line sometimes requires different methods and/or facilities for selling or providing services for that product line; in the above situations, the manufacturer needs the ability to seek alternative distribution where the dealer is unable or willing to make the commitment the manufacturer needs.

Under this proposed legislation, the manufacturer will be in a very precarious situation when attempting to effect changes, and litigation is a likely result as the parties will by definition disagree to the fairness of the proposed action. There appears to be no protection for manufacturers in this situation.

This bill presents so many possible areas of disagreement that litigation would be inevitable. The cost of litigation combined with the suspension of activities during litigation would be an extraordinary burden on small manufacturers—any manufacturer, for that matter.

It also does not take into account the investment manufacturers have made in their dealers.

We have been supporting our dealer network through various ways, an explicit written dealer policy and contract, including special financing packages, terms on display packages, and other resource and staff support programs.

A manufacturer does not make a significant investment in dealers merely because it is the right thing to do, but because it makes good business sense and is mutually beneficial to the manufacturer and the dealer.

The relationship between two totally separate companies will naturally be sensitive. We do not own the dealerships and the dealers do not own us. We have to work together. Partnership is not always 50-50. Sometimes we are contributing 75 percent to that partnership and the dealers 25 percent. And, admittedly, sometimes the shoe is on the other foot. But it is an ongoing relationship that is mutually beneficial; when it stops being mutually beneficial for either of us, we need the right to dissolve that relationship.

It is important for you to know that we have not always chosen to divest ourselves of dealers who are unable to perform due to limited resources. Let me give you an example, one which demonstrates the manufacturer's investment and support of dealers. A dealer was experiencing financial difficulty as well as not being able to provide the level of skills and marketing services that we needed in a certain city. We were faced with a choice: Do we help the present dealer become a better business, or do we open up another dealership in that city?

We decided that we would rather develop the present dealership, not bring in another dealer. So, we sent in a team of Herman Miller people who had background and expertise in marketing, finance, and sales. We sent this team in at no cost to the dealer. That team went in, evaluated the situation, and came back with a written plan and recommendations to the company. This dealer was free to take our advice and free to turn it down. He happened to take our advice, and subsequently turned the business around and has become one of the top volume dealers with Herman Miller.

This side of the dealer-manufacturer relationship appears to have been overlooked in examining the need for Senate bill 1256.

Another major concern we have, as an American manufacturer and corporate citizen is that this legislation will increase the already heavy burden on the Federal courts. The language in this bill is vague and would require that the judges deciding such cases have extensive business and marketing backgrounds in order to weigh all factors fairly.

The 20-mile limitation is arbitrary. It would have an effect in major markets such as New York, Chicago and Atlanta, having the effect of limiting us to one dealer, which is incomprehensible in terms of doing business in those markets.

The definition of market. It seems to include everything from machine tools to soap and from computers to pencils. There does not seem to be any rational reason for such coverage. Legislation should be limited to a class of products where a problem has been demonstrated or expanded to cover every product distributed by means of independent dealers, distributors, or representatives.

It is our understanding that this bill's original intent was to strenghten the position of office equipment dealers against Japenese and European manufacturers and to balance U.S. dealers' bargaining power with suppliers due to the abuses and unconscionable behavior on the part of some foreign manufacturers. We would like to note, in fact, that Senator Exon in his opening statement in the hearings before the Commerce Committee on January 19, 1982, stated: "I have been made aware, Mr. Chairman, of some concerns with regard to the intended coverage of this legislation. Let me say, again, this bill is intended to cover office machine dealers who have experienced great difficulties due to abusive marketing practices conducted by basically a few foreign manufacturers. This bill is not intended, nor do I believe it covers or goes beyond these boundaries."

Unless there have been major revisions in the bill that we are not aware of, this goes beyond the original statement of intent. The bill is not exclusive to foreign manufacturers of office machines and we are not sure that any legislation should be restricted to United States office machine manufacturers.

The definition of office machines versus other office equipment is changing daily, and this point I want to get home clearly. The innovation and discovery and technology make that so, so that in a few years it is going to be very difficult to tell the difference between what is actually office furniture and electronic equipment. A Federal district judge would have difficulty distinguishing the office machines from our product, office furniture systems, which are equipped with electronic devices to facilitate the work process in increasingly automated offices.

Our specific interest is that this bill would adversely affect Herman S. Miller.

In a broader sense, our objection is that we believe Senate bill S. 1256 is basically bad legislation, even if our industry was excluded from the bill. We do not feel S. 1256 is a solution to the pressing and very legitimate problems office equipment dealers are having with foreign manufacturers. We, however, believe the bill, as written, creates new and far-reaching problems for American manufacturers and dealers and, in the long term, for consumers.

This bill would materially impair all businesses' ability to do business through a dealer network, once again demonstrating its self-defeating properties. We do not feel the problem is that pervasive to require such drastic legislation.

I would rest on that.

Senator Exon. Thank you very much, gentlemen. It seems to me that at least the concluding statement by Mr. Pratt would indicate that you feel the intent of the bill is one that should be given some consideration, but we invited before the Commerce Committee hearing and during that hearing that if anyone had concerns with this bill to come and visit with us about it and we would try to make changes.

Specifically, Mr. Pratt, I would emphasize once again, as I emphasized in the Commerce Committee hearings, that the primary need in this area, and I address the primary needs, are the foreign manufacturers of office equipment as opposed to office furniture.

The difficulty we had with that is that the lawyers who worked on this advised us that we would eliminate any chance of the intent of the bill ever becoming operative if we wrote it only with regard to foreign manufacturers, and that was a big hang-up.

I would simply say to you that you seem to agree, at least you do, Mr. Pratt, that there is some problem in the office equipment industry. Those who rely on some manufacturer coming up with a product and then backing it up with proper parts, proper servicing information, proper training schools and working with the dealership.

After reading the testimony from the earlier hearing, rather than just oppose the bill outright, do you have any suggested remedies to address the problem that the bill attempts to address?

Mr. PRATT. Sir, in all due respect, maybe something such as dealers being more discerning about who they do business with would solve the problem.

We see this happen when manufacturers are struggling to increase their market penetration quickly, and we see dealers attempting to make a turn in their market rather quickly, and obtain some advantage with a line that maybe does not have all the reputation behind it, nor have they done the homework necessary to determine what kind of a company this is, and where we see that we see a big risk. That is a big gamble, and to create legislation that protects the down side of such a risk may be inappropriate to us.

Senator EXON. Your testimony centers, from what I can understand, on the possible adverse effects of section 3(4). This section can be made operational by defining the market area any way you wish in the dealer agreement. Does this allay your fears at all?

For example, if you are going to have any kind of a dealership in a field like Washington, D.C., obviously it is an area that would generally require more than one dealership. Now, if I were your contracting dealer in the Washington, D.C. area, what would be wrong with having the contract specifically spell out that you are going to have multidealers in this area, then it would be up to me in conjunction with Herman Miller to decide whether or not I wish to go into such an arrangement. All we are trying to do in this is to be fair to agents. You will also see in section 4 it gives the manufacturer the right to terminate a dealer at any time.

However, if the dealer is terminated before the contract expiration date, the dealer will receive fair compensation. I don't see your objection to that. Manufacturers retain the right to limit the contract to a fixed term, and in other areas when you open your negotiations to come to some kind of an arrangement between your manufacturing company and a dealer anywhere in the United States.

Mr. PRATT. Sir, at the present time we in fact over the last 5 to 6 years have been operating with our dealers with a contract which we sign. We started that for the purpose of trying to give a greater sense of security to those people as it related to our line.

And we have those kinds of clauses in those contracts right now. That does not, however, prevent differences of opinion between us, and Washington is a good example, since you brought it up, in which we have a dealer situation right here, and he has been a good dealer for a long time, but because of his decisions relative to investment of his capital and putting on other people that are required and so forth to get at this volume, he finds it difficult to grow at the rate that we think the numbers would indicate.

Those numbers are not our numbers. They are numbers developed by third parties, basically our association and MOPA, which he has access to. It does not do away, however, with those differences of opinion. We think any dealer, then, who could bring litigation or an injunction, who could stop action in a market for a period of time, would cause great problems.

I personally, as head of marketing for Herman Miller, would tend to begin working on a very direct program for that market as opposed to allowing myself to be tied up in that way.

Senator EXON. What is in the contract that you say Herman Miller has with regard to an expiration date?

Mr. PRATT. No, it has an expiration date and calls out what must be met in order to terminate and it calls out what the criteria for performance really are. It is service and volume goal, too.

Senator EXON. But in the case of the dealer in Washington, D.C. that you alluded to, you wish to make a change before the contract date expires?

Mr. PRATT. No. I said there are disagreements with his performance with regard to the goals and our desire to penetrate this market. If he had the right, for instance, then, to get an injunction before we opened another dealer, even though we specifically state in our policy that we will sit down with him, talk with him in the planning process, go through the numbers with him, show where they came from, show what we think that market is worth, before we open another dealer, even though we do that there is going to be disagreement with regard to that contract.

Senator EXON. All right. I am not sure we are going to get very far. All I would say is that S. 1256 is designed as a last remedy in case you and Herman Miller and the dealer in Washington, D.C. can't come to an agreement, which in most instances I think you would. In that event, the dealer, if the contract that you had, he entered into, if he thought he was not being treated fairly he would have standing in court, which he doesn't have now in the Federal courts.

Gentlemen, thank you very much. We appreciate your testimony.

[The prepared statement of Mr. Pratt follows:]

PREPARED STATEMENT OF THOMAS PRATT

Herman Miller is a publicly held company, which is engaged primarily in the manufacture and selling of furniture systems, products, and related services principally for offices and, to a lesser extent, for health care facilities and other uses. Through research and design the company has developed innovative solutions to operational problems in the office, institution, health science, material handling, and other environments in which its products and systems are used.

Herman Miller's headquarters are in Zeeland, Michigan. Other U.S. manufacturing and/or distribution facilities are in Spring Lake, Michigan; Holland, Michigan; Grandville, Michigan; Dallas, Texas; Irvine, California; Indianapolis, Indiana; and Norcross and Roswell, Georgia. Sales facilities and sales representatives are in major cities across the nation. The Herman Miller Research Corporation, in addition to its Grandville location, is in Ann Arbor, Michigan.

Over the years, Herman Miller has been fortunate to experience a highly successful performance record. We are able to do this with the cooperation and participation of our employees and our very strong dealer network, which is the key link between us and our customers.

Many of our customers are small businesses and businesses in the fast-growing electronic business. Our product is compatible with the growth of this industry due to the fact that it supports and conducts the automated office systems and facilitates the work process in the offices and manufacturing environments.

As a United States business competing with foreign companies, we are critically concerned about the long-range status of the United States businesses. We feel that the spirit of cooperation and compromise of diverse interest groups drawn from government, labor, and individuals in a free enterprise atmosphere has allowed this country to maintain its international competitive edge. We also understand, however, that our competitive edge is diminishing and agree that steps must be taken to protect and promote United States businesses. We feel, however, these steps, no matter how small, must be well grounded and carefully examined, and must be in the long-term interest of recovering America's competitive economic position in the world.

We believe any short term, exclusionary legislation, that may have negative long-term effects, will impair the ability of all of us to succeed. We caution that any legislation moving toward action in Congress that restricts or enables the business processes for one group versus another can have negative long-term effects on America's economy.

We believe Senate Bill 1256 to be single-issue oriented, aimed at legislating manufacturer/dealer relationships in a particular market with the intent to protect United States dealers from abuses of foreign manufacturers. This bill, however, ignores the broader set of concerns and possible adverse effects it will have to United States manufacturers; and ultimately to United States dealers and small businesses.

Herman Miller believes this legislation is antithetical to the free market concept that is the cornerstone of our economic system.

It has the effect, if not the purpose, of shielding businesses from the forces of competition. It restricts the manufacturer's ability to expand the number of dealers for its products and clogs both interbrand competition and intraband competition because:

1. The manufacturer's ability to compete strategically against other brands will be significantly curtailed.
2. The consumer's ability to obtain a particular brand at the best price and with the best service will be significantly curtailed.

Laws which protect businesses from competition by interfering with the natural forces of a free market are necessarily anti-consumer in their effect.

We believe this legislation may ultimately work to the disadvantage of dealers. Manufacturers will be encouraged, if not forced, to forward integration in order to recapture the flexibility in product distribution and marketing which is necessary in this dynamic competitive world. For example, manufacturers would be encouraged to sell through company-owned outlets or stores, rather than independent dealers. The example of IBM (which has no dealers) will not go unnoticed.

Herman Miller believes and supports the independent dealer network as a viable marketing program. This legislation would force us to look for alternate means of marketing to avoid litigation. It would also protect dealers that may not be doing a very good job over those dealers who are genuinely attempting to serve the customer. If we protect low-performance dealers, we run the risk of forcing prices up and service levels down.

We agree, after reading the testimony that came out of the Commerce Committee hearings, that something should be done to prohibit foreign companies from crippling United States dealers through unconscionable behavior. However, we question whether this proposed legislation is the remedy to that problem. This legislation could, in fact, cripple United States manufacturers from responding to true business needs. It will impair the manufacturers' ability to modify its business plans and arrangements to meet changing conditions in the market, or to accommodate special needs with respect to new products' innovations. This legislation does not consider the needs and concerns of manufacturers in this industry. The bill does not take into account:

1. Changes in marketing methods by existing competitors or the introduction of new competitors sometimes requires manufacturers to offset the marketing and/or distribution methods to meet that competitive challenge.

2. Sometimes dealers take on competitive product lines and/or emphasize the sale of competitive product lines to the detriment of the manufacturer.

3. The introduction of a new product line sometimes requires different methods and/or facilities for selling or providing services for that product line.

4. In the above situations, the manufacturer needs the ability to seek alternate distribution where the dealer is unable or unwilling to make the commitment the manufacturer needs. We have been faced with this situation many times. Depending upon the nature of the market and/or the nature of the product, establishment of an additional dealer may provide the solution. Sometimes, however, substitution of dealers is necessary in order to induce the new dealer to make the requested commitment.

Under this proposed legislation, the manufacturer will be in a very precarious situation when attempting to effect changes, and litigation is a likely result as the parties will, by definition, disagree to the fairness of the proposed action. There appears to be no protection for manufacturers in this situation.

This bill presents so many possible areas of disagreement that litigation would be inevitable. The cost of litigation, combined with the suspension of activities during litigation, would be an extraordinary burden on small manufacturers.

It also doesn't take into account the investment manufacturers have made in their dealers.

We have been supporting our dealer network through various ways, including special financing packages, terms on display packages, and other resource and staff support programs.

A manufacturer does not make a significant investment in dealers merely because it's the right thing to do, but also because it makes good business sense and is mutually beneficial to the manufacturer and the dealer.

The relationship between two totally separate companies will naturally be sensitive. We don't own the dealerships and the dealers don't own us; we have to work together. Partnership is not always 50-50. Sometimes we are contributing 75 percent to that partnership and the dealers 25 percent. And, admittedly, sometimes the shoe is on the other foot. But it is an ongoing relationship that is mutually beneficial; when it stops being mutually beneficial for either of us, we need the right to dissolve that relationship.

It's important for you to know that we have not always chosen to divest ourselves of dealers who are unable to perform due to limited resources. Let me give you an example, one which demonstrates the manufacturer's investment and support of dealers. A dealer was experiencing financial difficulty, as well as not being able to provide the level of skills and marketing services that we needed in a certain city. We were faced with a choice: Do we help the present dealer become a better business, or do we open up another dealership in that city? We decided that we would rather develop the present dealership, not bring in another dealer. So we sent in a team of Herman Miller people who had background and expertise in marketing, finance, and sales. We sent this team in at no cost to the dealer. That team went in, evaluated the situation, and came back with a written plan and recommendations to the company. This dealer was free to take our advice and free to turn it down. He happened to take our advice, and subsequently turned the business around and has become one of the top volume dealers with Herman Miller.

This side of the dealer/manufacturer relationship appears to have been overlooked in examining the need for Senate Bill 1256.

Another major concern we have, as an American manufacturer and corporate citizen, is that this legislation will increase the already heavy burden on the federal courts. The language in this bill is vague and would require that the judges deciding such cases have extensive business and marketing backgrounds in order to weigh all factors fairly.

Let me address some specific objections we have to 1256:

Good Faith

The primary feature of this legislation is an obligation to deal in "good faith." That obligation is already present under the Uniform Commercial Code which covers arrangements for the sale of goods and is in effect in 49 of the 50 States. The code imposes an obligation of good faith, which in the case of merchants, is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." There is also a substantial body of case laws developed in the various state courts regarding manufacturer/dealer relations.

Listed Standards

Another specific objection to the bill is the listed standards to be applied in determining whether the establishment of a new dealer is justified. These standards are highly subjective and certain to result in much litigation. The likelihood of litigation will be further enhanced by the prospect of collecting attorney fees and treble damages. These kinds of special remedies or penalties have been traditionally reserved for those interests where the Congress thought it was important to encourage enforcement of statutes of great public importance (such as the Anti Trust Laws) through "private attorneys general." Such drastic measures do not seem to be appropriate here.

Reasonable Compensation

Another provision of this bill which we object to is the provision obligating the manufacturer to pay a dealer "reasonable compensation" for whatever "value the dealer agreement" has "to the dealership" including a "reasonable amount for goodwill." We feel this provision is both unfair and unreasonable, especially where the parties contract for definite terms. This provision deprives the parties of their freedom to contract. Its effect is the creation of perpetual dealerships by government mandate. This provision imposes an immense contingent liability on manufacturers that is entirely unanticipated and that will eventually be reflected on the increase in price paid for the product by consumers. The amount of the obligation is dictated by a subjective standard and is open for interpretation.

Twenty-Mile Limitation

The provision limiting manufacturers to one dealership per 20-mile radius is arbitrary and unreasonable. It would deprive the customer of picking the dealership that they would like to work with and effectively ignores the different levels of quality and expertise that dealers have. Some don't have design capabilities, others don't have a full line of services to offer consumers. It's also unreasonable for large urban areas like New York/Atlanta/Chicago where a 20-mile radius would extend over the majority of those cities. It does not consider the potential of a market or the amount of consumers to be covered. It would also restrict the ability of new dealers to be established in a market area and could limit the potential for dealers to establish branch operations. It does not allow the manufacturer flexibility to service rapidly growing cities like many in the Southwest.

Market Penetration

We are completely baffled over the provision that states a desire for further market penetration in and of itself shall not serve as a justification to establish new dealers. Most reputable marketing and sales consulting firms will tell you that the incentive to increase market share is the dominant factor in a business's long-term success.

Definition of Product

This legislation affects every product and service used in an office or business environment and seems to include everything from machine tools to soap and from computers to pencils. There does not seem to be any rational basis for such coverage. If legislation is in order, it should be limited to the class of products where a problem has been demonstrated or expanded to cover every product distributed by means of independent dealers, distributors, or representatives.

It is our understanding that this bill's original intent was to strengthen the position of office equipment dealers against Japanese and European manufacturers and to balance U.S. dealers' bargaining power with suppliers due to the abuses and unconscionable behavior on the part of some foreign manufacturers. We would like to note, in fact, that Senator Exon in his opening statement in the hearings before the Commerce Committee on January 19, 1982, stated: "I have been made aware, Mr. Chairman, of some concerns with regard to the intended coverage of this legislation. Let me say, again, this bill is intended to cover office machine dealers who have experienced great difficulties due to abusive marketing practices conducted by basically a few foreign manufacturers. This bill is not intended, nor do I believe it covers or goes beyond these boundaries."

Unless there have been major revisions in this bill that we are not aware of, the bill goes far beyond the boundaries specified in Senator Exon's original statement of intent.

This bill is not exclusive to foreign manufacturers of office machines. We are not sure if any legislation should be addressed to United States office machine manufacturers. The definition of "office machines" versus other office equipment is changing daily with innovation, discovery, and technology. A federal or district judge would have difficulty distinguishing an office machine from our product, office furniture systems, which are equipped with electronic devices to facilitate the work process in increasingly automated offices.

Our specific interest is that this bill would adversely affect Herman Miller.

In a broader sense, our objection is that we believe Senate Bill 1256 is basically bad legislation, even if our industry was excluded from the bill. We don't feel Senate Bill 1256 to be a solution to the pressing and very legitimate problems office equipment dealers are having with foreign manufacturers. We, however, believe the bill, as written, creates new and far-reaching problems for American manufacturers and dealers and, in the long term, for consumers.

This bill would materially impair all businesses ability to do business through a dealer network, once again demonstrating its self-defeating properties. We do not feel the problem is that pervasive to require such drastic legislation.

Senator Exon. The last witness we have this morning is Mr. James M. Goldberg, of Abrams, Kovacs, Westermeier & Goldberg, of Washington, D.C.

Mr. Goldberg, thank you for appearing. We are running very late. Your full statement will be submitted as part of the record if you wish to do it in that manner.

STATEMENT OF JAMES M. GOLDBERG, ATTORNEY, ABRAMS, KOVACS, WESTERMEIER & GOLDBERG, WASHINGTON, D.C.

Mr. Goldberg. Thank you, Senator Exon.

Senator Exon. Could you possibly summarize your views?

Mr. Goldberg. Yes, Senator, I will be glad to. I am James Goldberg. I am an attorney in private practice here in the District of Columbia. Our clients include many trade associations of small businesses and many individual small businesses which sell a variety of products, both to consumers and within the office environment.

I am appearing here today on behalf of the National Retail Merchants' Association and the American Retail Federation.

By way of background, NRMA is the nation's largest trade association for the general merchandise retail industry. Its corporate members operate 40,000 department, chain and specialty stores across the country, with annual sales of approximately $175 billion, and nearly 3 million employees.

The ARF membership consists of 33 national retail trade associations, 50 State retail associations, the Greater Washington Board of Trade, as well as corporate members. Through its members, ARF represents more than a million retail establishments.

You have heard a lot of testimony about the problems with this bill. One of the main concerns we have is the definition of the term "office equipment." We are talking here of many different types of merchandise which would fit the definitions in the bill.

For example, carpeting, furniture, lighting, draperies, clocks, desk-top accessories, writing instruments, typewriters, executive gifts, engraved stationery, picture frames, paintings and prints, even engraved Christmas cards and men's and women's business clothing, such as uniforms. These are sold in a variety of types of outlets.

We have heard a lot this morning that the only thing this bill would do would be to grant standing to adversely affected dealers and enable them to redress their grievances with the manufacturers. Frankly, Senator, I think the testimony that was given by some of the office machine dealers here this morning indicates that, in fact, the dealers do have standing now.

Mr. Phillips, for example, talked in terms of being in Federal court and the only thing he seems to be unhappy about is the decision, not the fact that he didn't get into the front door, but the result.

There was other testimony by some of the dealers that they were in Federal court. One of the problems that you alluded to is the statute of frauds problem. There is a very compelling reason why the States have adopted the statute of frauds, which requires certain contracts to be in writing, and it seems to me that from a legal standpoint it doesn't make a lot of sense to abrogate the statute of fraud on the Federal level by the passage of S. 1256, which would enable any affected party to sue on the basis of an oral agreement.

There are a lot of problems with oral agreements, Senator. One of the problems is that by and large these oral agreements, the normal regular transactions between retailers and their manufacturers, are not for a specified period of time. For example, if a dealer, whether it be office equipment, as that term may be defined, or whatever, buys from a manufacturer, does he have some kind of an agreement with that manufacturer such that the manufacturer is obligated to continue to sell to him, or such that he is obligated to continue to buy from the manufacturer?

If in fact a retailer wants to enter, let's say, a Father's Day promotion activity and deal in writing instruments—ballpoint pens, for example—he may not have a written contract with the dealer to be an exclusive distributor within the area. He may have just an open buy-sell arrangement with that manufacturer.

If that dealer wants to come in and run at the dealer's expense a big Father's Day promotion and promote ballpoint pens as a gift for Father's Day, and that may be within the definition of office equipment, is that retailer precluded from doing so because the manufacturer then has to give notice to other dealers in the area who compete and sell the same writing equipment?

That would be an example, I think, Senator, of a situation that would be drastically anticompetitive, a retailer wanting to put on a promotion of a specified item of merchandise and being precluded from and unable to do so because of some of the notice requirements of S. 1256.

The problem as I indicated earlier is that the bill goes too far in addressing some of the normal agreements between manufacturers and retailers, most of which in my experience, are caused by a breakdown in communication. If the lines of communication were better opened between dealers and manufacturers, or manufacturers and dealers if you want to reverse the order, a lot of these problems wouldn't be problems at all. I think to provide a new Federal right when dealers now have standing to sue under the diversity laws, and the standing to invoke the good faith provisions of the Uniform Commercial Code, simply doesn't make any sense.

It is for those reasons, Senator, that the members of the NRMA and the ARF can find no pressing commercial or legal need for this act. Our stores deal daily with manufacturers all over the world as well as with domestic manufacturers. Individual problems have been appropriately solved by individual negotiations, according to the circumstances, and it has been clear that State contract law and State and Federal antitrust laws are more than adequate to adjust the rights and duties between the parties and keep the channels open for fair competition.

For those reasons, Senator, we urge the Judiciary Committee not to report out S. 1256.

Senator EXON. Thank you, Mr. Goldberg. I would like to ask you again the same question I have asked others. You are against the act, period, and you see no way that legally or properly any Federal legislation should be enacted in this area?

Mr. **Goldberg**. I think, obviously, from a legal standpoint, the Congress of the United States can enact whatever it wants to enact.

Senator **Exon**. So long as it is constitutional.

Mr. **Goldberg**. Off the top of my head, I don't see any constitutional problem with the act, but I don't see where it does anything that is not already available to dealers in this country.

Senator **Exon**. Again, I would emphasize I am not a lawyer, but just for the record, when you get at that microphone and sit there and say that there is remedy available in the Federal courts today, certainly you know, do you not, that it is very difficult for office machine dealers in particular to have any kind of proper standing in court to address these things the way they should be addressed? Or do you think they have full access to the Federal courts today?

Mr. **Goldberg**. Senator, with all due respect, I think they, or any other retailer, have access to the Federal courts. They have a diversity of citizenship requirement, where you have a dealer in one State and a company chartered in another State. You do have a $10,000 jurisdictional requirement to get into Federal court and I would suspect if we are talking about the kind of alleged abuses that we are talking about here, the $10,000 damage requirement is easily met, so you are in the Federal court.

The breach-of-contract problem is an available remedy in Federal court. You sue under the good faith, or lack of good faith provisions of the Universal Commercial Code. The State court adopts the law in the State in which the Federal court sits, so you have the good faith provision adopted.

And, frankly, I think the testimony we hear today indicates that the dealers do have access to Federal court. They have that access, and indeed their only problem is that they didn't get the kind of result they wanted.

That is what you face when you go into court. Sometimes you win and sometimes you don't.

Senator **Exon**. To your knowledge, has an office machines dealer received any judgment satisfactory to him in these areas of recovery?

Mr. **Goldberg**. I don't know, Senator.

Senator **Exon**. Thank you.

[The prepared statement of Mr. Goldberg follows:]

PREPARED STATEMENT OF JAMES W. GOLDBERG

Thank you for this opportunity to make a statement before the Committee on the Judiciary and the Subcommittee on Business, Trade and Tourism of the Senate Commerce Committee on S.1256, the Office Machinery and Equipment Retail Dealers' Agreement Act. I am appearing here today on behalf of the National Retail Merchants Association (NRMA) and American Retail Federation (ARF).

By way of background, NRMA is the nation's largest trade association for the general merchandise retail industry. Its corporate members operate 40,000 department, chain and specialty stores across the country, with annual sales of approximately $175 billion, and nearly 3 million employees.

The ARF membership consists of 33 national retail trade associations, 50 state retail associations, the Greater Washington Board of Trade, as well as corporate members. Through its members, ARF represents more than a million retail establishments.

Together, these two associations represent virtually all of this country's leading department stores, mass merchandise stores, and specialty stores, most of whom are retail dealers of merchandise covered by this Act. Yet, rather than being benefited by its provisions, our stores would be hopelessly burdened by the Act's requirements and can find no overriding commercial or legal rationale for its passage. Therefore, the NRMA and ARF, on behalf of their members, oppose the enactment of S.1256.

The Act, by its terms, would cover most of our retailers. The "office machinery and equipment retail dealers" for whom the Act is named are defined as any person or business "operating under the terms of a dealer agreement and primarily engaged in the business of selling the product of a supplier to a consumer for use in an office environment." (Section 2(2)).

"Product" is defined as "any physical object or soft-ware, when used in an office environment." (Section 2(11)). Our stores carry many different types of merchandise that would fit this definition: for example, furniture, carpeting, lighting, draperies, clocks, desk-top accessories, writing instruments, typewriters, executive gifts, engraved stationery, picture frames, paintings and prints, even engraved Christmas cards and men's and women's business clothing. The limiting word "primarily" would not necessarily exempt department stores, for example, for what supplier could be sure from month-to-month or year-to-year whether a store's sales of products subject to the Act were greater or lesser than those that were not subject (assuming that to be the meaning of "primarily").*/ Nor would the additional requirement that the store "operate under the terms of a dealer agreement" necessarily exempt our retailers, since although many of our stores operate as "authorized dealers" in the usual sense, the broad definition of "dealer agreement"**/ would arguably include even the simplest telephone order of merchandise by those who might not be so classified.

The supposed "protections" that the Act would give our retailers would instead deprive them of the flexibility and fast turnaround time they must have in placing orders and changing suppliers in order to provide consumers with the vast array of fresh, new merchandise that American consumers expect from their stores. This Act would in effect "freeze" a store's supplier and product mix just as it exists now.

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*/ Conversely, "primarily" surely could not mean a dealer whose primary business is selling the product of one supplier, in light of Senator Exon's reference to the independent office machine dealer as representing a mix of manufacturers and equipment. Congr. Rec. (Senate) at S.5520 (May 21, 1981).

**/ Section 2(3) provides that "'dealer agreement' means any written or oral agreement which purports to fix the legal rights and liabilities of the parties to such agreement or contract, for a definite or indefinite period between any supplier engaged in commerce and any dealer."

The Act's notice requirement and the right of objection (through federal court action) it gives to current dealers would place our retailers under severe buying constraints. Retail stores may change merchandise and suppliers monthly, depending on the season of the year or the holiday. Orders are placed constantly, and deliveries are made daily. A store can't wait 60 days for a new supplier to give notice to all its present retailers within 20 miles of its intent to sell to the store and then risk the chance of an injunction and court hearing on the merits of the order.

For example, retailers usually plan their Christmas catalogs in the spring to allow enough time before Christmas for catalog printing and mailing, merchandise delivery and customer order placement and delivery. Under this Act, a store would have to determine at its peril which of the merchandise that it would like to include might arguably be covered by the Act, wait for the supplier to give required notification by the Act, wait for the supplier to give required notification to the other stores with which the supplier deals, and hope that no other store exercises its right under the Act to start a court proceeding against sale of some item, thus stopping the distribution of its Christmas catalog dead in its tracks. Needless to say, Christmas (a retailer's biggest season) comes but once a year and can't be resurrected in May.

The notice requirements also would effectively halt a retailer's ability to order and take quick delivery from fresh, new suppliers with "hot" new products at any time through the year.

The notice requirement and accompanying cause of action is also unworkable in its unprecedented reach. Our stores rarely are assigned geographic selling areas by their suppliers. The Act, however, provides that if a "market area" is not specified or prohibited, it shall be deemed to be a 20 mile area around the retailer, an area that would take in the usual downtown area of our cities and most of its suburbs. Section 2(10)(B). Any present retailer of the product in that area then would have the right to receive notification and to go to federal court*/ to stop another store's proposed order. In Philadelphia, for example, if Department Store X had agreed with Pen Company Y to start carrying its pen and pencil sets in time for a big Father's Day promotion, Pen Company Y would have to notify every other store (which would most likely include at the minimum other department stores, office supply stores and stationery stores) within 20 miles, which would include stores in downtown Philadelphia and probably most of the suburbs. Not only would each of these stores have the right to go to court to stop this order, but Store X's competitors would now have access to competitive information they shouldn't normally be entitled to. Moreover, the court proceeding encouraged by the Act is not a summary one, but would require much expensive "expert" testimony on such difficult concepts as whether "current economic and marketing conditions" warrant adding a new dealer and whether the objecting dealer is providing "adequate competition" and "convenient end-user service." Section 3(b)(3).

Our stores' ability to attract new suppliers to develop new products to sell at competitive prices would also be significantly impaired by the requirement that our stores be offered compensation by a supplier when a relationship ends. Few, if any, suppliers could afford to take on that burden without raising its prices, which in turn would force us to either raise retail prices or not carry the merchandise at all, thus losing potential profit and restricting consumer choice.

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*/ A significant additional problem would be raised by the Act's venue provision which provides that the protesting store may only sue in the federal district court where the supplier "resides, is found, has an agent, or does business." Section 3(b)(2). Since store buyers often travel across the country or abroad to place orders, a store could be forced to defend itself far from its home base, an expensive proposition.

Members of NRMA and ARF can find no pressing commercial or legal need for this Act. Our stores deal daily with foreign manufacturers all over the world, as well as with domestic ones. Individual problems have been appropriately solved by individual negotiations according to the circumstances. Our stores have found that state contract law and state and federal antitrust laws are more than adequate to adjust the rights and duties between the parties and keep the channels of trade open to fair competition.*/

Moreover, rather than curtail litigation, enactment of this Act would create it. Under this Act, federal courts would be hopelessly burdened with local contract matters -- endless complaints by objecting dealers for injunctive relief, which in turn requires courts to squeeze in prompt hearings because of procedural rules applicable to injunctions. Appeals, however, could take one or two years, effectively deterring a store from ever changing its inventory.

The Act itself will surely be challenged in court by those affected as to the meaning of its various provisions and definitions, and as being inconsistent with the antitrust laws on the gound that its notification provisions and grant of a cause of action to a current dealer to challenge a new dealer sets up an illegal "dealer cartel."

On the basis of the above, NRMA and ARF urge the Committees to reject this legislation.

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*/ The courts often note that the antitrust laws are designed to protect competition, not competitors. Antitrust actions by terminated dealers often fail because they cannot prove that their supplier acted other than unilaterally or that their termination or lack of access to the supplier's product (however motivated) had an anti-competitive effect on the market.

Senator Exon. We are about to adjourn the hearing. The Judiciary Committee will leave the record open for 2 weeks. They asked me to make that announcement today in closing the hearings.

I was also advised that there is history made this morning, all of you. This is the first time in 29 years that a non-Judiciary Committee member has presided over proceedings of this committee. This is also unique in that I am not a lawyer. That is either pertinent or not, depending on your point of view as to whether that is an asset or a liability.

With that, I adjourn the hearings.

[Whereupon, at 12:45 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

97TH CONGRESS
1ST SESSION

S. 1256

To regulate interstate commerce by protecting the rights of consumers, dealers, and end-users.

IN THE SENATE OF THE UNITED STATES

MAY 21 (legislative day, APRIL 27), 1981

Mr. EXON (for himself, Mr. FORD, Mr. CANNON, Mr. HEFLIN, and Mr. PRESSLER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To regulate interstate commerce by protecting the rights of consumers, dealers, and end-users.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act shall be cited as the "Retail Dealers' Agreement Act".

DEFINITIONS

SEC. 2. As used in this Act the term—

(1) "dealer" means any person, corporation, partnership, association of dealers, or other form of business enterprise resident in the United States or in any

territory thereof operating under the terms of a dealer agreement and engaged in the business of selling the product of a supplier to consumers or other end-users in any office of business environment;

(2) "supplier" means a manufacturer, distributor, or wholesaler who enters into a dealer agreement with a dealer in order to supply the dealer with a product;

(3) "manufacturer" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of a product which it manufactures, assembles, constructs, or creates;

(4) "distributor" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer of a product which it manufactures, assembles, constructs, creates, or obtains in any manner from a manufacturer; and

(5) "wholesaler" means any person, corporation, partnership, or other form of business enterprise engaged in the sale, consignment, exchange, or any other form of transfer (primarily to dealers) of a product which it obtains from a manufacturer or distributor;

(6) "product" means any physical object, software, method, or service used in an office or business environment;

(7) "service" means installation and after-sales support;

(8) "dealer agreement" means any agreement or contract, written or oral, for a definite or indefinite period between any supplier engaged in commerce and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract;

(9) "United States" means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(10) "commerce" means commerce within the United States or between the United States and foreign nations, or in any territory of the United States, or in the District of Columbia, or among the territories or between any territory and any State or foreign nation or between the District of Columbia or any State or territory or foreign nation;

(11) "good faith" means the duty of each party to any dealer agreement, and all officers, employees,

agents, or other representatives thereof, to act in a fair, equitable manner toward each other so as to guarantee each party freedom from coercion, intimidation, threats of coercion or intimidation, fraud, or unconscionable conduct by the other party; and

(12) "market area" means the dealer's geographic selling area of responsibility as defined in a dealer agreement, or, if not defined in the dealer agreement, the geographic area, within one hundred miles of the dealer's primary place of business in which the dealer principally conducts its business, including, selling the product, servicing the product, and in other ways satisfying the needs of the end-users of the product.

VIOLATIONS

SEC. 3. (a) It shall be a violation of this Act for any supplier—

(1) to induce a dealer to enter into a dealer agreement by fraud;

(2) to fail to act in good faith in performing or complying with any terms or provisions of a dealer agreement, including furnishing the dealer with products, parts, reference manuals, and schematics on a timely basis;

(3) to fail to act in good faith in terminating, canceling, or refusing to renew any dealer agreement; or

(4) to enter into a dealer agreement with a dealer whereby the dealer will conduct business in a market area which is already the market area of another dealer or dealers of the same product without providing sixty days notice of the proposed dealer agreement to the existing dealer or dealers of the same product in the relevant market area.

(b)(1) In the event the presently existing dealer or dealers object in a timely manner to the establishment of the proposed dealership, the propriety of the establishment of the proposed dealership shall be determined with reference to the guidelines set forth in paragraph (2). Nothing herein shall be construed to prevent a supplier from implementing affirmative action programs providing business opportunities for minorities or from complying with applicable Federal, State, and local law.

(2) In any proceeding in which a violation of paragraph (1) is claimed, the court shall consider all pertinent circumstances surrounding the establishment of a new dealership in the relevant market area, including—

(A) whether the establishement of such additional dealership is warranted by current economic and marketing conditions;

(B) the current and past volume of retail sales and service business for the product transacted in the relevant market;

(C) the effect the investment made and obligations incurred by the objecting dealer or dealers in the relevant market area would be diminished by the establishment of another dealership;

(D) the permanency of the investment of the objecting dealer or dealers in the relevant market area;

(E) whether the objecting dealer or dealers in the relevant market area are providing adequate competition, convenient end-user service, adequate sales, and service facilities, equipment, parts, and qualified personnel to reasonably provide for the needs of the end-user of the products sold and serviced in the relevant market area: *Provided, however,* That the desire for further market penetration, of itself, shall not serve as the justification for allowing the establishment of a new dealership in the relevant market area;

(F) the manufacturer's previous representations regarding future dealer establishment; and

(G) the ability of the objecting dealer or dealers to meet existing and future supplier quotas in light of the establishment of another dealer.

(3) In any action brought under this Act the dealer's lack of good faith may be raised as a defense.

(4) A supplier may terminate, cancel, or refuse to renew a dealer agreement by offering the dealer fair and reasonable compensation for the value of the dealer agreement to the dealership, including a reasonable amount for goodwill. Nothing in this section shall be construed to affect the right of a supplier to terminate a dealer agreement for just, good, and significant cause.

DEALER'S RIGHTS TO REPRESENTATION

SEC. 4. No supplier shall deny to any dealer or prospective dealer the right to be accompanied by counsel or a personal representative to any meeting between the parties for the purpose of discussing any matter regarding a dealership or a proposed dealer agreement.

FREE ASSOCIATION

SEC. 5. Every dealer shall have the right of free association with other dealers for any lawful purpose, and no supplier shall interfere in any way with any dealer's exercise of such right. Any dealer or groups of dealers whose right has been so violated may bring an action to enjoin such supplier from such action.

CIVIL ACTION

SEC. 6. Any dealer affected by a supplier's violation of this Act may bring an action against such supplier in any district court of the United States in the district in which the supplier resides, is found, has an agent, or does business, without respect to the amount in controversy, for damages, injunctive or other equitable relief, attorney's fees, and the costs of suit. If the court finds the violation was willful, the court may increase the amount recovered as damages to a total of three times the amount of actual damages.

LIMITATIONS

SEC. 7. Actions arising out of any provision of this Act shall be commenced not later than four years after the violation occurs. If a supplier liable hereunder conceals the cause of action from the knowledge of the person or entity entitled to bring it, the period prior to the discovery of the cause of action by the person or entity entitled shall be excluded in determining the time limited for the commencement of the action.

ANTITRUST LAWS

SEC. 8. Nothing in this Act shall be construed to repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States, as defined in section 1 of the Clayton Act (15 U.S.C. 12), and section 4 of the Federal Trade Commission Act (15 U.S.C. 44), and any State antitrust law.

EFFECT ON STATE LAW

SEC. 9. Nothing in this Act shall supersede the right of any State to enact or enforce any law which provides additional or stronger standards, criteria, or remedies than those provided in this Act.

EFFECT OF CONTRACT

SEC. 10. Any condition, stipulation, or provision purporting to bind any dealer or any person acquiring any dealership to waive compliance with any provision of this Act is void.

ADDITIONAL STATEMENTS FOR THE RECORD

STATEMENT OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

ON S.1256

"OFFICE MACHINERY AND EQUIPMENT DEALER'S AGREEMENT ACT"

BEFORE THE

SENATE JUDICIARY COMMITTEE

JUNE 28, 1982

This statement is on behalf of the Computer and Business Equipment Manufacturers Association (CBEMA) which represents 41 companies accounting for 85 percent of the sales volume of computers and business equipment produced in the United States. During 1981, CBEMA member companies had revenues in excess of $50 billion, employed 750,000 workers in the United States, and had a trade surplus of $7 billion.

The purpose of this statement is to express CBEMA's concern over and opposition to Senate bill 1256. The bill purports to correct inequities in the relationships between dealers in office equipment and their suppliers. CBEMA believes that not only would this legislation and legislation of this type create many problems in the commercial market place, there is no need for federal intervention in an area which is already adequately protected by state statutes as well as the Uniform Commercial Code.

Some of our concerns with S. 1256 are as follows:

1. The bill is contrary to the Administration's established policies and practices toward reducing burdensome Federal regulation and providing the commercial market place the freedom to conduct business without unwarranted Federal intervention.

2. The bill would have disastorous effects on the competitive nature of this industry.

3. The bill would add to what is already an overloaded Federal Court system.

4. The bill's terminology is ambiguous and will lead to increased litigation and interpretation problems as well.

Increase of Federal Regulation

One of the most prominent and productive acts of the current Administration has been to institute programs which seek to alliviate the business communinty from burdensome federal regulation. The object of this endevour has been two fold. One, it seeks to stregthen our economy when it is most needed by allowing private industry to free resources for re-investment and the creation of new jobs. Two, it provides a cost savings for Government in that it no longer is required to expend resources in personnel and finances to implement regulations that provide no return.

Anti-Competitive

The cornerstone of the American Free Enterprise system has been its unique compeititive base. Competition, to be effective must not be restrained by providing unfavorable advantages to any particular segment. It is possible that some dealers might benefit under the federal legislation (albeit unfairly), the benefits which they gain are at the expense of not only other dealers and suppliers but the competitive system as well. Frankly, the few, if any, benefits which would be derived would likely come not as a result of an unfair practice or strong cause of action, but rather an unwillingness on the part of the supplier to become embroiled in costly litigation.

Overloading the Federal Courts

The federal courts have for some time experienced loads on their dockets which they have been unable to clear. This problem exists for a number of reasons, the most obvious of which is that there are simply too many cases pending in the system. Of course this is not to suggest that where cases exist on solid actions they should be ignored. But where cases are manufactured to provide artificial and unfair causes of actions it is not a practical nor prudent action to further strain our courts system.

Ambiguous Language

It will be suggested that this bill is another lawyers full employment act. Generally, that phrase is used when legislation is introduced whose terminology is so ambiguous that attorneys must be called upon to decipher what the phrases were intended to mean when put to use in a particular circumstance. S. 1256 is frought with these conditions. Under normal circumstances the Uniform Commercial Code and Contract law provide sufficient guidance for parties wishing to enter into mutually beneficial aggreements. S. 1256 however, apparently seeks to establish contract law targeted to a specific situation, i.e., the office and business equipment environment. The legislation uses such terms as "...for use in an office environment:" , "whether the investment and obligation (of the dealer) would be diminished...?", and "the permanency of an investment (by the dealer)" just to name a few. In addition to the ambiguous terminology, the bill apparently assigns some rather unique responsibilities to the courts. For instance, the judge will be required to determine the "current economic and marketing conditions" and the "impact on competition"..."the extend to which the public interest will be served...".

In view of the few areas which have been highlighted in this submission and the litany of others which exist in the bill, CBEMA feels that the legislation is contrary to the Administrations position on federal regulations,and it is unecessary and unworkable. We strongly recommend that the Judiciary Committee reject S. 1256.

STATEMENT
OF
J. EDWARD DAY, SPECIAL COUNSEL,
ON BEHALF OF
CONSUMER ELECTRONICS GROUP
OF
ELECTRONIC INDUSTRIES ASSOCIATION
BEFORE
SENATE JUDICIARY COMMITTEE
IN OPPOSITION TO S. 1256,
THE RETAIL DEALERS AGREEMENT ACT

INTRODUCTION

My name is J. Edward Day. I am a lawyer in general practice and for a number of years have represented the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG).

EIA/CEG is the trade association for manufacturers of consumer electronic products such as television receivers, radios, phonographs, audio systems and tape recorders. We represent substantially all of the domestic manufacturers of television receivers and also several of the leading foreign-owned manufacturers that have facilities in the United States. We also represent a substantial number of companies, both domestic and foreign-owned, which manufacture or market other consumer electronic products such as household radios and automobile radios.

The purpose of my statement is to express and explain the manufacturers' strong opposition to S. 1256, which purports to correct inequities in the relationship between dealers in office equipment and their suppliers. It is the position of EIA/CEG that this bill would give rise to a myriad of problems and create a highly undesirable precedent for government interference in the relationship between manufacturers and dealers of other types of products.

EIA/CEG bases its opposition to S. 1256 on the following points, among others.

1. The bill, which is essentially regulatory in

nature, contravenes the view of a large majority of the population which favors reducing federal regulation. The prevailing public mood is clearly against the granting of new and sweeping authority to interfere in established business activities.

2. Passage of this bill will place an even greater burden on the already overloaded federal court system.

3. The bill would have direct and indirect anticompetitive effects.

THIS BILL MEANS MORE UNNECESSARY FEDERAL LEGISLATION

The introduction of this bill flies in the face of current concern over the costs and reasonableness of government regulation.

The need for a federal protective statute to control the positions of dealers in their relations with their suppliers is dubious at best. Dealers have traditionally pursued state remedies in order to protect themselves and their territories from certain unscrupulous manufacturers. There is no need for a federal statute in this area of concern, and, as is discussed below, enactment of such a statute would be likely to cause more harm than good.

Furthermore, the net benefits to society resulting from this bill would probably be negative. Although some dealers might benefit from the extra statutory security they would enjoy under the federal legislation, those benefits would be more than offset by such results as inefficiency and stagnation in the marketplace, and "blackmail" settlements agreed to by manufacturers attempting to avoid the high costs of litigating even those lawsuits they could win.

PASSAGE OF THE BILL WOULD ADD UNNECESSARILY TO THE BURDEN OF THE FEDERAL COURT SYSTEM

It is a matter of public record that the federal courts have had to resort to a significant "pruning" of their dockets in order to keep up with their enormous caseloads. It is clear that this bill would place an even greater burden on the federal courts. It has been reported that filings in the District of Columbia Circuit are currently almost four times what they were in 1950, and it is expected that pending cases in that circuit alone will exceed 1,700 by the end of this year.* Members of Congress should heed the numerous warnings of federal judges and administrators when they grapple with the question whether to add a flood of new cases to the federal dockets by enacting S. 1256.

REASONS FOR EIA/CEG EXPRESSING ITS OPPOSITION

Section 2(6) of S. 1256 directs its specific coverage at vaguely defined products. "Product" is defined as "any physical object, software, method, or service used in an office or business environment." This could include many of the products made by certain of our EIA/CEG members such as office copiers, small computers, tape recorders, dictating equipment, telephone answering equipment, small calculators, and other items. It is increasingly common to have television receivers in offices and this is likely to be true as to video cassette recorders. Monitors for closed circuit television and very large screen television receivers are used extensively for inter-office conferences in large firms or for management and training purposes.

But we are by no means concentrating our strong objections to this legislation on the particular products which may fit within the definition and which may be made or distributed to our members. Instead we are mainly concerned with the threat of this type of government regulation in general. We oppose having government interference in the sales distribution practices of manufacturers whether the products are for consumer use or office use. Ours is an intensely competitive, profit squeezed industry and we fear the effects of sweeping controls of our dealings with those who sell our products.

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* "Robinson's Remarks on D.C. Circuit Caseload Efforts," Legal Times of Washington, 21 (June 8, 1981).

We oppose the principle involved here. For the same reason we have and continue to actively oppose the so-called Sales Representatives Protection Act which is pending before a House Subcommittee. We have also strongly challenged the bills which have been proposed in the California State legislature dealing with relations between manufacturers and dealers. Fortunately, that California proposal, which has many similarities to S. 1256, has been shelved.

Controversies with dealers are relatively rare in our industry. It would be disastrous to create invitations to controversy by enacting S. 1256.

The heart of the bill is the preservation of existing dealer market areas. In the absence of a different provision in the dealer agreement, if any, the market area is the geographic area within 100 miles of the dealer's primary place of business. There is a long list in the bill of actions which are considered "violations."

It is a so-called violation for a supplier to permit a new dealer to conduct business in the market area of an established dealer if the established dealer objects and if certain specified criteria are not met. One of the particularly troublesome criteria is the following:

> Sec. 3(b)(2)(A): "whether the establishment of such additional dealership is warranted by current economic and marketing conditions."

This substitutes the judgment of a federal judge for that of merchandising executives of the supplier. The language is so broad that any relevant dealership change would require the services of expensive independent expert witnesses and the preparation of elaborate marketing studies.

Incredibly the bill intrudes even further into merchandising decision making by providing that "the desire for further market penetration, of itself, shall not serve as the justification for allowing the establishment of a new dealership in the relevant market area." Market penetration is the essence of competitive free enterprise. The bill substitutes a welfare program for dealer security for the legitimate disciplines which are part of any successful sales operation. A dealer with the protections provided by the bill is likely to be a dealer with eroded motivation. In our industry the keynote is survival - not a guaranteed secure niche in the framework of the selling effort. A dealer with an agreement, under this bill, can be terminated only by a buy-out.

We urge the Judiciary Committee to report unfavorably on S. 1256

NEMA

National Electrical Manufacturers Association
2101 L Street, N.W. Suite 300
Washington, D.C. 20037 (202) 457-8400

July 12, 1982

Senator Strom Thurmond
Chairman
Senate Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

RE: S.1256 - Office Machinery and Equipment Retail Dealers Agreement Act

Dear Chairman Thurmond:

We were surprised to hear that your Committee held hearings on the Office Machinery and Equipment Retail Dealers Agreement Act on Monday, June 28th. We think the concept behind the bill is fundamentally unsound. Despite efforts of the drafters to narrow the scope of the bill, it would still have a negative impact on our industry. Even without the impact on the electrical industry, NEMA would oppose the bill because it is inappropriate and unnecessary federal legislation.

The National Electrical Manufacturers Association (NEMA) is the major domestic trade association for manufacturers of electrical products, from generation of electricity through transmission and distribution stages, and includes some end uses like lighting, smoke detectors, motors and controls. At the present time, the membership includes more than 550 companies subdivided into about 70 subdivisions based on product lines.

The concept behind S.1256 is fundamentally unsound.

Proponents of S.1256 have argued that the bill is designed to require good faith in relationships between suppliers and dealers. Proponents have related problems between dealers and their suppliers, often foreign entities, arising from stringent demands made by the suppliers. They have also told of the unform rejection of the NOMDA Model Agreement, some concepts from which have been incorporated into this bill.

Elements of "good faith" are subject to existing state law remedies

The term "good faith", as defined in § 2(8), is directed to dealing with abuses in the relationship between dealer and supplier that are subject to state law already. Fraud is actionable in both the civil and criminal contexts. The jurisprudence of the Uniform Commercial Code includes many decisions on unconscionability. Fairness has been the subject of lawsuits based on theories of reasonableness in dealing. Coercion is the basis for a cause of action in many states. While this list could be extended, NEMA wonders whether, in light of the New Federalism, the Judiciary Committee is really interested in creating new federal rights of action.

NEMA also opposes some of the specific requirements of S.1256 that arise form this definition of "good faith." The bill would require notice of the supplier's intent to establish a new dealership within the marketing area of an existing retail dealer or within a 20-mile radius. Notice would also be required prior to terminating or not renewing an agreement with a dealer, with an opportunity for the dealer to sue in federal district court. Such notice interferes with what is typically a business decision.

How to get products to market is an issue that should be left to economic analysis by management without fear of judicial second-guessing. It is valuable to the manufacturer to sell to dealers who are intimately familiar with the local market and can quickly respond, not only by selling more of a product when it is needed but by reporting to the supplier that potential buyers are not interested in the product. Both dealers and suppliers ought to be able to decide what products to sell, and how much effort to put into selling them, according to their perceptions of the market they serve. If a manufacturer wants to change his marketing scheme, that decision ought to be a matter of supply and demand, profit and loss. Likewise, the dealer who wants to change the emphasis he places on the products he sells should do that as a result of his perception of the market conditions that exist. If S.1256 passes, the manufacturer would then have to add to his business analysis the question of whether or not an expansion of his liability to lawsuit in a federal court will result from a decision to modify a marketing plan or to discontinue a dealer. This analysis is unproductive and unneeded. NEMA feels that significant economic detriment will be imposed on dealers for whom the bill is intended. The likelihood of costly litigation by disaffected dealers will discourage many manufacturers from using dealers to market their products.

The basis of the bill must be reconsidered.

Apparently, in response to criticism at Commerce Committee hearings in October, 1981, the words "for use in the office environment" were added. See § 2(2), 2(11). These words still do not adequately restrict the scope of the bill. For example, among NEMA products that would be covered are lamps, smoke detectors, fuses, circuit breakers, wire and cable, wiring devices, and probably several others. The drafters responded in a similar way to opposition from representatives of franchisors by adding limiting words to § 2(2) and § 2(12) and new definitions at § 2(5)-(7). If the drafters intend to preclude opposition by narrowing the scope of the bill, NEMA submits that the more important basic question is whether the concept behind the bill is sound and whether the legislation is needed.

Before adding a property right to a contractual relationship, NEMA urges the Judiciary Committee to consider whether any federal law is needed on this subject.

Sincerely,

Dale R Schmidt

Dale R. Schmidt
Manager of Legal Services

LETTERS

INDEPENDENT COMPUTER DEALERS OF AMERICA
ICDA, INC.

c/o Accounting Equipment Corporation
5815 N. Black Canyon, Suite 101
Phoenix, Arizona 85015
(602) 242-9440

1982 JUL 20 AM 10:44

July 14, 1982

Honorable Paul Axalt
United States Senate
Washington, D.C. 20510

Dear Senator Axalt,

On behalf of my organization, the Independent Computer Dealers of America, I urge you to support S.1256, the RETAIL DEALERS AGREEMENT ACT.

I have the authorization of all of the other officers and Trustees of our organizaiotn to request your help in their behalf. A list of their names follows:

Edward R. Goff, President
c/o Accounting Equipment Corp.
5815 N. Black Canyon, Suite 101
Phoenix, Arizona 85015

John Mulcahy, Treasurer
c/o YBM Corporation
1505 Logan Ave.
Youngstown, Ohio 44505

Bruce Bolden, Trustee
Southern Business Systems
P.O. Box 66
Dothan, AL 36302

Ray Breaux, Trustee
c/o American Accounting Machines
P.O. Box 9419
Metairie, LA 70055

Anthony Vitale, Vice President
c/o Pro Systems, Inc.
63 Sockannossett Road
Cranston, R.I. 02920

Stan Russell, Trustee
c/o Standia Systems
12951 NE Bel-red Road
Bellewview, WA 98005

Sue DeVrieze, Trustee
Business Systems Corporation
558 28th Street
Des Moines, IA 50312

Please see that this letter becomes a part of the permanent Committee Hearing record. Thank you for your help in this matter.

Sincerely,

Gloria L. Wills

Gloria L. Wills, Secretary
Independent Computer Dealers of America

NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
CONSULTING ECONOMISTS
FIVE WORLD TRADE CENTER, NEW YORK, N.Y. 10048
TELEPHONE: 212-524-7800

ALFRED E. KAHN
SPECIAL CONSULTANT

JUL 16 1982

July 14, 1982

The Honorable Strom Thurmond
U. S. Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I am happy, at your request, to supply the following answer to the question you posed in your letter of July 2:

Q. The brewers and wholesalers ~~also~~ assert that exclusive territories are necessary to combat transshipping, which, they argue, is a severe problem in this industry and can result in driving some wholesalers out of business. This, in turn, would ultimately lessen competition, particularly with respect to smaller accounts. Would you comment on the transshipping problem?

A. "Transshipping" is another word for competition. Whenever sellers' plants or warehouses are geographically separated, the only way they can compete is by making sales in each other's market territories. To argue against transshipping in these circumstances is to contend that each seller should have a sheltered monopoly in the vicinity of his own source of supply; and to permit transshipments to be precluded is to promote monopoly.

The market itself will prevent transshipment from proceeding to uneconomic lengths, since a firm that makes sales in the vicinity of a competitor's plant will be at a transportation cost disadvantage. If despite that disadvantage it finds it profitable to invade that market, that can only mean the price prevailing there is well in excess of its production costs. It should obviously be free to do so, in these circumstances, because its competition provides buyers in that market with effective protections against overcharging by the local supplier.

It is of course conceivable that this competition from adjacent suppliers may drive a local supplier out of business. But that is how competition is supposed to work. If the local supplier cannot compete with outside sellers, despite its transport cost advantage, this can only mean it does not deserve to survive. To protect it from competition in the purported interest of preserving competition is irrational: one does not preserve competition by suppressing it.

Nor are such preventions of competition justified in order to protect small businesses. Artificial restraints of this kind will just as often deny some small company an opportunity to do business or to grow as they will protect another from competition. The basic premise of our free enterprise system is to give all companies, large and small, an opportunity to prove their worth in the free market, in free and open competition. There is no basis in our economic history for the assumption that, as a general proposition, small businesses will not be able to survive and prosper in such an environment.

Sincerely,

Alfred E. Kahn

Alfred E. Kahn
Special Consultant, N/E/R/A

Robert Julius Thorne Professor
of Economics, Cornell University

STATEMENT OF ROBERT T. SIEMON

CHAIRMAN OF THE BOARD, HALSEY & GRIFFITH, INC.

AND

PRESIDENT OF THE NATIONAL OFFICE PRODUCTS ASSOCIATION

ON S. 1256

"RETAIL DEALERS' AGREEMENT ACT"

TO THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NATIONAL OFFICE PRODUCTS ASSOCIATION
301 N. FAIRFAX ST., ALEXANDRIA, VIRGINIA 22314 / 703-549-9040

Mr. Chairman, Members of the Committee,

My name is Robert T. Siemon and I'm Chairman of the Board of Halsey & Griffith, Inc., in West Palm Beach, Florida. We are a 10-store, general line dealership which carries office supplies, office machines and office furniture.

I am also President of the National Office Products Association and will hold this elected position until October. At that time, another dealer will be elected to office. The National Office Products Association is a 78-year-old trade association which today represents 4,800 dealers, 800 manufacturers, and 100 wholesaler companies engaged in the distribution of office supplies and furniture. We also represent approximately 2,000 individual sales representatives.

In addition to being a member and President of the National Office Products Association, I am also a member of the National Office Machine Dealers Association.

It is our understanding that the intended purpose of the legislation before you today, S. 1256, is to provide office machine dealers with a remedy to protect themselves against arbitrary actions of office machine manufacturers. It is our further understanding that this bill is intended to help solve specific problems involving Japanese office machine manufacturers, in particular.

While we do not deny that problems in this specific area do exist, it is the opinion of the National Office Products Association that the bill ranges from its intended purpose.

The definition of the term "product" as used in the bill involves considerably more than just machines. It involves pens and pencils, desks, chairs, credenzas, filing equipment, paper, calendars--indeed, every conceivable item found in an office environment. For your information, we have included at the end of our statement a partial but representative listing of products ordinarily found in an office environment and considered to be office products in the traditional sense of the word. The companies that manufacture these products, wholesale them, or retail them constitute the office products industry and are represented by the National Office Products Association.

With the exception of a few furniture lines, office products are generally considered to be "open lines." This would also include some machine lines. In other words, they are available from any manufacturer or supplier to any dealer. In still other words, dealer agreements do not really exist for the vast majority of parties involved in the distribution of office products.

However, the definition of the term "dealer agreement" [Section 2(8)] as found in S. 1256 could change that situation radically. If read literally, the definition of dealer agreement could include agreements which derive from a single established spot sale by a manufacturer or wholesaler to a dealer, perhaps forever afterwards establishing, for the purposes of the Act, a relationship between the two parties that was never intended. If a single spot sale is not enough, one must ask how many sales would constitute a dealer agreement? The fact is, under the present language a "dealer agreement" could arise when neither party intended that such a relationship exist.

That being the case, enactment of S. 1256 would do far more than permit machine dealers to sue office machine manufacturers for violations of dealer agreements. The Act would have the full effect of converting open lines to exclusive lines and establishing dealer agreements in an industry where, for the most part, none now exist.

It is difficult to imagine the degree of confusion which would ensue. In the long run, the industry might find itself executing a myriad of short-term written agreements for hundreds, perhaps thousands, of products. But would these written agreements really be short-term? The introduction of the concept of "good faith" in Section 3(a)2 and 3(a)3 gives rise to a number of questions. Does the introduction of the "good faith" standard require that the parties have an obligation which goes beyond a written dealer agreement? If the manufacturer or wholesaler terminates an agreement in accordance with its terms under Section 3(a)3, must the manufacturer or wholesaler meet an additional standard in determining whether or not that agreement must be renewed?

When contracts or agreements expire by their terms, for all intents and purposes, neither party has any further obligation to the other. Presumably, that would not be the case were S. 1256 enacted. The concept of "good faith" as used in Section 3(a)3 would seem to tie two parties together perhaps forever, or until such time as a court of law decided the relationship is, indeed, at an end.

This whole issue of exclusivity is troublesome to us. And Section 3(a)4 takes the issue one step further.

Were this provision of the bill to become law, any dealer who wants to take on a machine, furniture or supply line that was currently being sold by another dealer in a competing "market area" would not necessarily find a willing seller. Under the Act, the manufacturer or wholesaler could not agree to sell to a new dealer without risking a suit by the original dealer. And, should the dealer sue, the Court would then decide, under conditions and guidelines as prescribed in the bill, whether the manufacturer or wholesaler has the right or reason to sell to another dealer. If the manufacturer or wholesaler wished to avoid the risk of suit, they could compensate the dealer for the value of the dealer agreement.

This section appears to create significant barriers to dealers entering into new market areas where an existing dealer or dealers handle the same supply line. It would prevent dealers from taking on a new line if an existing dealer or dealers objected in court.

While we do not feel that the addition of a new dealer in a market area is always justified, we oppose a procedure which would throw the decision on whether or not an additional dealer should be added to a market area into an already overcrowded court system. This would only serve to stifle competition while the laborious court process was pursued under standards which the court might find itself ill-equipped to interpret.

The National Office Products Association recently completed an exhaustive study with Stanford Research Institute that details future growth in the industry. I believe it would be helpful were I to quote some pertinent conclusions found in the study:

> "The office products industry is composed of three primary business groups: Office supplies, office furniture, and office machines.
>
> "--The total end-market for office products in this country is expected to grow in constant 1977 dollars over the course of the 1980's at an average annual rate of 11%.
>
> "--The end-market value of office supply sales is expected to grow from $14.5 billion in 1977 to $32 billion by 1989 at an average annual rate of 7%.
>
> "--The end-market value of the office furniture and furnishings sold is expected to grow from $2.4 billion in 1977 to $10 billion by 1989 at an average annual rate of 12%.
>
> "--The end-market value of office machine sales and rentals is expected to grow from $17.6 billion in 1977 to $83 billion by 1989 at an average annual rate of 14%."

As you can see, those areas where growth is expected to increase the most dramatically are in furniture and machines. The study goes on to say, and I quote:

> "Depending on a dealer's resources, major diversification opportunities will exist in the office open plan systems and budget furniture markets and in the office machine market. Technology and manufacturer support programs should make office machines a much more appealing business to the dealer. (Emphasis added.) Technology will also create opportunities for the dealer to diversify into office machine based services, and computers will increasingly be used to provide trade services to lock in account relationships.
>
> "...for the office supply dealer (whose market is expected to grow at an average annual rate of less than 8%) higher growth can be achieved by taking on machine supply lines, emphasizing contract customer services and walk-in, mail order and telephone selling programs, and diversifying into office furniture, office machines (emphasis added) and office services.

The nature of this industry is changing rapidly. We expect that by the end of the decade, the product based distinctions that currently separate the industry into "business groups" will not be as apparent. Traditional office products and furniture dealers will be selling some machines and as our study points out, office machine dealers will be selling some supplies and furniture.

We believe dealers should have the ability to make those choices freely. However, enactment of S. 1256 and specifically Section 3(a)4 could impede that freedom by effectively freezing markets and thereby preventing growth and diversification by dealer members of our Association.

As a representative of small businessmen, the National Office Products Association has a long history of supporting the free market system in this nation. And the relative freedom this industry has enjoyed over the years has, in our opinion, permitted us to become one of the most stable, solid and growth-oriented industries in America.

To entertain the idea that contractual relations between our members should now be governed by Federal law or that the Courts should have the power to decide where and how growth or expansion will occur in the industry would constitute a severe departure from tradition.

The free market system has not failed this industry in the past. We fully believe it will serve us well in the future. It is our sincere hope that the members of the Committee will agree with us.

We thank you for the opportunity to present our views.

1. Accounting/Adding Machines
2. Addressing Machines
3. Adhesives
4. Albums, Scrapbooks
5. Art Supplies
6. Audio Visual Supplies, Equipment, Accessories
7. Autographic Registers, Supplies
8. Badges, Badge Holders
9. Binders—Data Processing
10. Binders—Post
11. Binders—Ring
12. Binders—Other
13. Binding Equipment & Supplies
14. Blank Books
15. Boards—Bulletin, Chalk, Directory, Magnetic
16. Boards—Clip or Arch
17. Bookcases
18. Bookkeeping Systems
19. Books—Accounting, Address, Appointment
20. Boxes—Filing
21. Boxes—Locking
22. Business Cases
23. Brushes
24. Cabinets & Lockers
25. Calculators
26. Calendars
27. Carbon Paper, Solvent Film, Carbon Sets
28. Cards/Index, File, Rotary File
29. Cash Drawers, Registers
30. Casters, Glides
31. Catalogs, Directories, Publications
32. Chair Cushions
33. Chairs—Clerical & Secretarial
34. Chairs—Executive
35. Chairs—Lounge & Occasional
36. Chairs—Stacking & Folding
37. Check Protectors, Checkwriters
38. Cleaners
39. Clips, Pins, Tacks, Signals
40. Clocks
41. Coin Handling Machines, Coin Wrappers, Currency Bands & Supplies
42. Collating, Sorting, Folding Equipment
43. Copiers
44. Copier Supplies
45. Copy Holders
46. Correction Fluid, Paper, Tape
47. Costumers, Coat Racks, Coat Hangers
48. Covers & Cases—Office Machine
49. Covers & Sheet Protectors
50. Credenzas
51. Cutlery
52. Data Processing Equipment
53. Data Processing—Media and Printout Storage
54. Data Processing Supplies
55. Decorative Accessories
56. Desk Accessories
57. Desks—Metal
58. Desks—Wood
59. Diaries
60. Dictating, Recording Equipment
61. Dictionaries
62. Drafting Equipment
63. Drafting Instruments & Supplies
64. Duplicating Machines
65. Duplicating Supplies
66. Embossing Machines & Supplies
67. Envelopes
68. Erasers
69. File Folders & Supplies
70. Files & Filing Equipment
71. Fixtures—Display & Other
72. Flags, Pennants, Banners
73. Food & Beverage Equipment
74. Forms—Business Stock or Imprinted Systems
75. Furniture—Systems
76. Games & Toys
77. Globes, Maps, Atlases
78. Greeting Cards
79. Imprinting, Numbering & Dating Machines
80. Index Guides
81. Inks
82. Labels, Label Holders, Decals
83. Lamps
84. Leather Goods & Luggage
85. Lighting Fixtures & Bulbs
86. Locks, Hardware, Key Control Systems
87. Machine Stands, Tables
88. Magnetic Media—Tapes & Discs
89. Magnifiers, Readers
90. Mail Handling Supplies & Equipment
91. Marking Devices
92. Mats—Floor or Desk
93. Microfilm Equipment & Supplies
94. Paper—Commercial & Social
95. Paper Cutters
96. Paper Rolls
97. Pencils—Wood-Cased
98. Pencils—Mechanical
99. Pencil Sharpeners
100. Pens—Ball Point & Refills
101. Pens—Porous Point
102. Pens—Rolling Ball
103. Pens—Fountain
104. Pen Sets
105. Planters
106. Posting Trays, Stands
107. Printing & Engraving
108. Punches, Drills
109. Racks—Books, Magazine, Time Card
110. Ribbons—Inked
111. Rubber Bands
112. Rulers
113. Safes, Office Boxes, Protective Equipment
114. Scales
115. Scissors & Shears
116. Seals—Corporate or Notary
117. Shelving
118. Shredders
119. Signs—Engraved, Magnetic
120. Smoking Accessories
121. Stamps & Stamp Pads
122. Staplers, Staples, Removers, Fasteners, Fastening Devices
123. Tables
124. Tablets, Pads
125. Tags
126. Tapes, Dispensers, Moisteners
127. Telephone Accessories
128. Telephone Answering Equipment
129. Time Cards
130. Time Stamps & Time Stamping Equipment
131. Typewriters & Typewriter Parts
132. Upholstery
133. Visible Equipment
134. Visual Aids, Wall Charts
135. Wall Graphics
136. Wastebaskets
137. Word Processing Equipment
138. Word Processing Supplies, Storage, Accessories